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Supreme

No. 7

STANDARD DREDGING CORPORATION,
APPELLANT,

vs.

FRIEDA S. MILLER, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, AND MIKE CASSABETAKIS

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT.

FILED JANUARY 11, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 722

STANDARD DREDGING CORPORATION,
APPELLANT,

vs.

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[fol. 1]

IN NEW YORK SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT

In the Matter of the Claim for Benefits under Article 18 of the Labor Law Made by MIKE CASSARETAKIS, Claimant; STANDARD DREDGING CORPORATION, Employer-Appellant; FRIEDA S. MILLER, as Industrial Commissioner, Respondent

STATEMENT UNDER RULE 234

This proceeding was commenced by claimant's request for a hearing upon disclosure that local office records indicated claimant had no record of earnings in covered employment. A Notice of Hearing, dated July 12, 1940 was served on the Employer-Appellant for a hearing before Referee Louis J. Naftalison to determine whether claimant worked in covered employment. The hearing was held before the Referee on September 5th and 11th, 1940. On October 9, 1940, the Referee rendered his decision holding that claimant worked in covered employment and was entitled to be credited with his earnings with the Employer-Appellant. The Employer-Appellant filed a notice of appeal on November 4, 1940 to the Unemployment Insurance Appeal Board from the decision of the Referee. On March 3, 1941, the Unemployment Insurance Appeal Board rendered its [fol. 2] decision, affirming the decision of the Referee. An appeal from the decision of the Appeal Board was taken by the Appellate on April 1, 1941.

The name of the Employer-Appellant is Standard Dredging Corporation. The name of Respondent is Frieda S. Miller, as Industrial Commissioner. The attorneys for Appellant are Kirlin, Campbell, Hickox, Keating & McGrann. The attorney for the Respondent is John J. Bennett, Jr., Attorney General. The Claimant at the hearing before the Referee appeared in person but did not appear before the Appeal Board. There has been no change of party or attorneys herein.

[fol. 3] STATE OF NEW YORK, DEPARTMENT OF LABOR

Unemployment Insurance Appeal Board

[Title omitted]

NOTICE OF APPEAL—April 1, 1941

SIRS:

Please Take Notice that Standard Dredging Corporation, employer in the above entitled proceeding, hereby appeals to the Appellate Division of the New York Supreme Court in and for the Third Department, from the decision of the Unemployment Insurance Appeal Board made on the 3rd day of March, 1941, and from each and every part thereof.

Dated, New York, N. Y., April 1, 1941.

[fol. 4] Yours, &c., Kirlin Campbell Hickox Keating & McGrann, Attorneys for Employer-Appellant, Office & P. O. Address, 120 Broadway, New York, N. Y.

To: John J. Bennett, Jr., Esq., Attorney General of the State of New York, Attorney for Respondent, 80 Center Street, New York, N. Y.; Department of Labor, 342 Madison Avenue, New York, N. Y.

[fol. 5] BEFORE DEPARTMENT OF LABOR

DECISION OF APPEAL BOARD IN CASE NO. 4014-40—March 3, 1941

STATE OF NEW YORK,
Department of Labor:

Unemployment Insurance Appeal Board

Re: Name 511-314-40R

S. S. No..... Employer No.....

The employer appeals from the decision of the referee dated October 9, 1940 holding that the claimant worked in covered employment and is entitled to be credited with his earnings with said appellant.

Hearings were held before the referee at which all parties appeared and were accorded full opportunity to be

heard. Briefs submitted on behalf of the Industrial Commissioner and the employer have been considered by the Board.

After a careful review of the record, testimony and evidence adduced before the referee, and due deliberation having been had thereon, and having found that the referee's findings of fact and conclusions of law are fully supported by the evidence in this case, and that no errors of fact or law appear to have been made, the Board adopts the findings of fact and the conclusions of law made by the referee as the findings of fact and conclusions of law of this Board.

Opinion

The Board is of the opinion that the referee made proper findings of fact and correctly determined the issues involved in this case. This Board's recent opinion in Appeal Board [fol. 6] No. 3604-40 is so applicable to the instant facts that we incorporate it herein by reference. Appeal Board No. 2552-40, relied on by the appellant, is not in point. The latter case involved a "vessel propelled by steam commissioned to carry petroleum products." In the instant case, the vessel involved is a non-self propelled dredge carrying neither cargo nor passengers.

Decision

Claimant worked in covered employment within the meaning of the New York State Unemployment Insurance Law and is entitled to be credited with his earnings with the appellant as fixed by the referee.

The decision of the referee is affirmed.

Dated: March 3, 1941.

(S.) John E. McGarry, Member.

[fol. 7] BEFORE DEPARTMENT OF LABOR

NOTICE OF APPEAL TO APPEAL BOARD

[Title omitted]

To Division of Placement and Unemployment Insurance, 342 Madison Avenue, New York, N. Y.

SIRS:

Appeal is hereby taken from the decision of Louis J. Naftalison, Referee, dated October 9, 1940, on the following grounds:

(1) That said decision is contrary to the decisions of the Unemployment Insurance Appeal Board, to the Opinion of the Attorney General, and to the accepted and settled construction of the New York Unemployment Insurance Law.

(2) That the claimant was employed as a member of the crew of a vessel, documented under the laws of the United States, on navigable waters of the United States.

[fol. 8] (3) That said employment is maritime in nature and subject to the exclusive jurisdiction of the Federal Government.

(4) That, in exercise of said exclusive jurisdiction, the Federal Government exempted such employment from the provisions of the Social Security Act.

(5) That said employment is not covered by the New York Unemployment Insurance Law.

(6) That, if such employment is intended to be covered, the said Law is unconstitutional and void.

Standard Dredging Corporation, Employer-Appellant, by Kirlin Campbell Hickox Keating & McGrann, Attorneys, 120 Broadway, New York City.

To: Mike Cassaretakis, Claimant (Case No. 511-314-40R).

To: Industrial Commissioner.

[fol. 9] BEFORE DEPARTMENT OF LABOR

UNEMPLOYMENT INSURANCE REFEREES' UNIT

Claimant: Mike Cassaretakis.
Referee: Louis J. Naftalison.
S.S. No.: 124-10-5937.
At: New York City.

Case No.: 511-314-40R. On: September 11, 1940.

DECISION OF REFEREE—October 9, 1940

APPEARANCES:

Mike Cassaretakis, Claimant.
Standard Dredging Corporation, by: Walfred L. Paulson, Vice-president and Secretary; George F. Gee, Dredging Captain; Ray Pippitt, Clerk.
Kirlin, Campbell, Hickox, Keating & McGrann, by: H. Maurice Fridlund, Esq.; Roy T. Parker, Esq.; Earl Q. Kullman, Esq., of Counsel, attorneys for employer.
Division of Placement and Unemployment Insurance, Legal Bureau, by: Harry I. Rosen, Esq.

[fol. 10] Issue

Whether claimant, while employed as a cook and cooks' helper aboard a dredge, worked in covered employment.

Findings of Fact

Claimant worked aboard the dredge "Miami" from February 4, 1939 to March 15, 1939, while the dredge was located in the waters at Bayonne, New Jersey. During this period his employer was the Standard Dredging Corporation of New Jersey, the owner of the vessel.

From March 15 to August 15, 1939, claimant was employed aboard the same dredge, but during this period his employer has been established to be the Standard Dredging Corporation (a New York corporation). Both concerns are interrelated and it has been established that the New York corporation operated the dredge from March 15 to August 15, 1939, at least under a charter arrangement with the New Jersey corporation.

Claimant's services for the New Jersey corporation having been performed wholly outside the State of New York, his employment and earnings have been disregarded for the purpose of this decision.

The Standard Dredging Corporation of New York is a covered employer. During the period with which we are concerned, it was engaged in operating the dredge "Miami" in Gravesend Bay, which is adjacent to the Borough of Brooklyn, City of New York. It had a contract with the City of New York Park Department to pump material from beneath the surface of Gravesend Bay on [fol. 11] to the land in order to fill in the shore line and create an addition to a public highway under the jurisdiction of the Park Department. The dredge was non-self-propelled, but moved from spot to spot in the vicinity of its operations by means of cables or spuds. The material excavated from underneath the waters was conveyed to land by means of pipe lines attached to the dredge, and which rested upon pontoons spaced between the dredge and the shore.

A superintendent was in charge of the workers aboard the dredge, and although maritime titles were applied to these positions, the description of the work seems to indicate that their labors were principally with the operation of the dredging machinery and engines, as well as the incidental work connected therewith.

Claimant's work was that of assistant cook, dishwasher and waiter, taking care of the feeding requirements of the personnel of the dredge. He slept aboard the dredge. During the last few weeks of his employment, he served as a watchman while the dredge was out of operation and tied up.

The employer has fixed the value of claimant's maintenance at a dollar per day, and the claimant has accepted this figure as a reasonable one.

The employer has not paid contributions on the earnings of claimant and others similarly situated, because it contends that claimant is a member of a crew of a vessel and, therefore, is excluded from the coverage of the New York State Law. It further contends that the dredging operations were wholly maritime in character because they were performed following the issuance of a permit by the United States Engineer's office of the War Department. It ap- [fol. 12] pears that this governmental agency is charged

with the duty of exercising control over the navigable waters, and that it is a condition precedent to working in such waters for a permit to be issued from this agency.

The work of the dredge in this particular instance was definitely in connection with the construction of a highway on land. It carried no cargo, nor passengers. It definitely was not engaged in the general work of navigation. The personnel aboard the dredge were not required to be licensed by any federal agency. The employer's attorneys argue that it is not the use to which the dredge was put that controls, but rather its nature, and that it was adapted to do wholly maritime work in the deepening of harbors and removing of obstructions from channels, et cetera.

At the conclusion of the case there was no dispute between the parties as to claimant's earnings.

They are as follows:

Standard Dredging Corporation, (A New York corporation), 80 Broad Street, New York, New York.

1939: First Quarter, 93.31; Second Quarter, 339.96; Third Quarter, 140.83.

Decision

The attorneys for the employer spent considerable time in arguing that the dredge "Miami" is a vessel documented under the laws of the United States. This conclusion, how- [fol. 13] ever, is not controlling on the unemployment insurance issue before me. They further argue that a cook, or cook's helper, is a member of a crew of a vessel. Again, that broad proposition is not applicable to the facts in the immediate case. They further contend that the work of the dredge "Miami" in this particular instance was distinctly maritime, because it was done pursuant to a War Department permit. However, the compliance with the War Department's regulations, as to the performance of operations on the navigable waters of the United States, does not take away from the State of New York the right to tax employment such as is here concerned.

The operations of the dredge "Miami" involved construction rather than navigation. It was intimately connected with, and was part of, a distinct land operation, namely, to fill in the shore line to create a roadway on land. The work was done under the supervision of a superintendent rather than the officer of a vessel.

This case is controlled by the decision of the Appeal Board in Case No. 1180-39, which held that even though the employment involved may be maritime, that in and of itself was not sufficient to deprive the State of New York of the right to tax the payrolls concerned. The Appeal Board held that the claimant in that case, employed on a hydraulic dredge operating similar to the "Miami" in this case, worked in covered employment, and that unless Congress had reserved to itself exclusive jurisdiction in this maritime situation, the State of New York was free to legislate and tax. In this case New York has jurisdiction because all of the work here involved was performed within its territorial borders.

[fol. 14] The only question which now remains is whether claimant comes within the definition of the phrase, "officers and members of a crew of a vessel," as prescribed in the Social Security Act. The Appeal Board has ruled that this is a phrase of exclusion and should be given a narrow construction. The Appeal Board has found that the term "crew" is referred to, and is naturally and primarily thought of, as including those who are on board and aiding in the navigation of a vessel. The nature of claimant's employment with relation to the dredge upon which he worked is determinative of the question whether he was to be considered a member of a crew within the purview of the Federal Act.

Claimant, working aboard a non-self-propelled dredge operating in New York harbor to aid in land work, is definitely not a member of a crew within the compass of the Federal intention. The dredge was not engaged in navigation, nor in the transportation of passengers or freight. It had no officers in the accepted sense of that word, nor a crew, within the same meaning. Despite maritime titles, the work was in the construction field, under the direction of a superintendent, who was placed in authority above the so-called captain of the dredge.

On the basis of the Appeal Board decision, as herein discussed, I find that claimant worked in covered employment within the meaning of the Unemployment Insurance Law of the State of New York, and that he is entitled to be credited with the foregoing earnings, towards the payment of benefits due. I further hold that the employer is liable for contributions accordingly on the earnings of claimant and others similarly situated.

[fol. 15] A copy of this decision is being sent to the Bureau of Tax and Wage Records for the collection of contributions due.

Louis J. Naftalison, Referee.

9/5/40—A. Weinstein.
9/11/40—W. Newrock, Bk. #125.
10/7/40—D. Codner, Decision Only.

To: Mike Cassaretakis, 311 West 27th Street, New York, New York; Standard Dredging Corporation, 80 Broad Street, New York, New York; Kirlin, Campbell, Hickox, Keating & McGrann, Esqs., 120 Broadway, New York, New York; Harry I. Rosen, Esq.

[fol. 16] Before Department of Labor

Unemployment Insurance Referees' Unit

Notice of Hearing

Claimant: Mike Cassaretakis. Address: 311 West 27th Street, New York, N. Y.

Other Parties: Name: Standard Dredge Corporation. Address: 80 Broad Street, New York, N. Y.

Date 7/12/40. L. O. 511.

S.S. No. 124-10-5937.

You Are Hereby Notified to Appear on July 30, 1940 (Date), at 2:30 P. M. (Time) at 342 Madison Avenue, Room 1010, New York City.

Before Referee Louis J. Naftalison.

Purpose of Hearing: To determine whether claimant worked in employment subject to the Law in 1939.

[fol. 17] Important! To All Parties: You must bring to this hearing your witnesses, if any, and all evidence that has a bearing on this case, including all pay records, books, statements of earnings, et cetera.

. . . . . .

. . . . . .

Unemployment Insurance Appeal Board, by Samuel I. Kastle, Administrative Referee.

1/mm.
7/30/40.

No Adjournment of This Hearing Will Be Granted unless valid reason is presented in writing. Application for ad-

journment must be made in writing at least 4 days before the date of hearing.

See Important Information on Reverse Side

Labor UI-AB1.3

To the Employer: By the service of this notice either personally or by mail, you are made a party to this proceeding, entitled to be heard.

[fol. 18] The questions

1. Whether you are or were an employer within the meaning of and subject to the Unemployment Insurance Law or

2. Whether you are or were liable for the payment of the contributions imposed upon employers by said Law or

3. Whether you, as employer as defined by such Law, have fully complied with the obligations imposed upon employers by said Law

Or Any Other Issue Related Thereto **may be decided by the Referee herein and his decision shall not be deemed limited in its effect to the claimant herein named but shall be deemed a general determination of such questions and issues with respect to all those employed by you, for all the purposes of the Unemployment Insurance Law and such decision shall be conclusive and binding upon you, subject, however, to your right of appeal, which right you can assert *Only If You Appear At The Hearing.*** (Sections 530 & 531 of the Unemployment Insurance Law, Article 18 of the Labor Law.)

[fol. 19] BEFORE DEPARTMENT OF LABOR

REQUEST FOR HEARING ON INITIAL DETERMINATION ON STATEMENT OF EARNINGS

Claimant: Mike Cassaretakis. Address: 311 W. 27 St., New York City.

Date 6/13/40.

Local Office No. 511
S. S. Acct. No.
124-10-5937

Earnings

I request a hearing on the issue of:

Coverage [X]

Reason for Contest: I claim the following earnings in employment subject to the New York State Unemployment Insurance Law in addition to the earnings on which my Initial Determination dated ..... was based.

Employer	*Add'l Money Wages in Each Quarter*	*Other Remuneration in Each Quarter*
Standard Dredge Co.	91/160.00	91/58.50
80 Broad St.	92/275.00	92/58.50
New York City	93/170.00	93/58.50

Initial Determination was based on following earnings:

[fol. 20]

Employer	*Total Wages and Other Remuneration in Each Quarter*
As above	

(UIC 40) Signed x Mike Cassaretakis, Claimant.

Additional Information: (Names and address of other persons, witnesses, co-workers, union, etc., to be notified of hearing.)

(Illegible) (Insurance Manager or Deputy), 259 W. 14th St., N. Y. C. (Address).

[X] Contest on Original Claim.

Check box if contest has arisen subsequent to filing of Original Claim, ES-333, but prior to filing of Additional Claim, ES-333.5.

Labor ES-400.21 (5-21-40-M).

[fol. 21] BEFORE DEPARTMENT OF LABOR

Unemployment Insurance Referees' Unit

Hearing before Referee—September 5, 1940

Present: Louis J. Naftalison, Referee

Abraham Weinstein, Reporter

APPEARANCES:

Mike Cassaretakis—Claimant.
Standard Dredging Corp. by Walfred L. Paulson, Vice-President and Secretary.
Wesley H. Paulson—Bookkeeper.
Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for the Employer, by Earl Q. Kullman, Esq.
H. Maurice Fridlund, Esq.
Roy T. Parker, Esq.
[fol. 22] Harry I. Rosen, Esq., Legal Bureau, Representing the Division of Placement and Unemployment Insurance.
Hearing Held: September 5, 1940.
The case was duly called.

MIKE CASSARETAKIS, Claimant, having been duly sworn, testified as follows:

By the Referee:

Q. What is your occupation?
A. I am in the restaurant business, always before, but then I lose the business and I start to be laborer.
Q. Did you work for the Standard Dredging Corporation?
A. Yes.
Q. What work did you do for them?
A. I started with dishwasher, nineteen dollars a week.
Q. When did you start as a dishwasher?
A. Fourth of February, 1939.
Q. Do you know the day?
A. Fourth of the month.
Q. How long did you work as a dishwasher?

A. I don't remember exactly but I guess no more than six weeks and then they give me job of waiter. I wait sixty people sometimes.

Q. Where did you do your work as a dishwasher?

A. Daytime.

Q. Where?

A. Right here on Statue of Liberty.

Q. You did what?

A. I work on Statue of Liberty.

[fol. 23] Q. Did you work on the Statue of Liberty or on a boat?

A. On a boat.

Q. What is the name of the boat?

A. Miami is the name.

Q. This dredge Miami did some work around the statue of Liberty?

A. I started from there. She digged the Statue of Liberty.

Q. She digged around the Statute of Liberty?

A. Yes.

Q. Did you do dishwashing work on this dredge Miami?

A. Yes.

Q. All of your work was done on the Miami?

A. Yes.

Q. Until when did you work?

A. To August.

Q. What day in August?

A. Well, last two weeks; three weeks of August and last three weeks I was watchman because dredge lay on Coney Island.

Q. This was in 1939, is that right?

A. Yes.

Q. You say the last three weeks you worked as a watchman?

A. Yes, fifty cents an hour.

Q. Where was the dredge——

A. In the winter they made me dishwasher and I got nineteen dollars.

Q. Where was the dredge tied up when you were a watchman?

A. Coney Island. We fix Bay Parkway all the road. We finish entry down there and I was watchman.

Q. When you worked as a watchman, did you work as a waiter too?

A. No, nothing, just watchman.

Q. Was the dredge out in water or tied to a pier when you were a watchman?

A. No, tied to a pier there, yes. See, I have three payments nineteen dollars, twenty-two dollars and thirty-three cents and then thirty-four dollars.

[fol. 24] Q. Did you also receive your meals?

A. I paid my own meals when I got fifty cents an hour. I pay my own expense, just sleep.

Q. When you were a dishwasher and waiter, did you receive meals?

A. Oh yes.

Q. How many meals a day?

A. Three meals a day.

Q. When did you report for work?

A. Same day I started and after two days——

Q. No, what time of the day did you report for work?

A. When I started you mean? From seven in the morning to five in the evening.

Q. Did you get an evening meal too if you quit at five o'clock?

A. Oh, yes, we'd get it, yes.

Q. How many days a week did you work?

A. Six days a week.

Q. Did you sleep at home?

A. Lots of times I go home.

Q. Did they have a place on board for you to sleep?

A. I can sleep there if I want to stay.

Q. Did you sleep aboard the dredge?

A. Yes. If I want to sleep there, I can sleep there all the time.

Q. How often did you sleep aboard the dredge?

A. Most of the time because I can't afford to go home and come back. I get so tired working.

Q. How many men worked on this dredge?

A. Well, this dredge, sometime on Bay Parkway this Mr. Sackett——

Q. Mr. Who?

A. Mr. Sackett.

Q. What did he do?

A. He have sometimes in Bay Parkway, I don't know, sometimes three, four hundred people and the Mr. Mayor LaGuardia stop it.

Q. Ordinarily, how many people worked on board the dredge?

A. I never see less than forty-five people; lots of people they go out.

[fol. 25] Q. Will you answer my question?

A. Yes.

Q. To the best of your knowledge, about how many people worked on board the dredge when you were a dishwasher and waiter?

A. Over forty-five.

Q. When you said before that you served from sixty to seventy-five people, whom did you mean?

A. That's the men, people who come from outside to eat and they pay.

Q. What people came from the outside to eat aboard the dredge?

A. People who fix pipes outside or remove pipes or work, dig around and make partitions.

Q. When you started to work in February 1939, where was this dredge located.

A. Around the Statue of Liberty I told you.

Q. Around the Statue of Liberty?

A. Yes.

Q. How long did it remain around the Statue of Liberty?

A. We remained there near four, five weeks. I don't remember exactly. Then we pull the dredge from there to Brooklyn drydock. She repair there about three weeks or more.

Q. Did you work on board the dredge when it was in drydock?

A. I was a waiter and dishwasher. I do everything.

Q. Did the men work on board the dredge when it was in drydock?

A. Yes.

Q. What work did they do?

A. They work outside when they repair dredge. They move lot of things from there to other job and come there at night to sleep and eat.

Q. After the dredge left the Brooklyn Drydock, where did it go?

A. To Bay Parkway, start a new job.

Q. You mean the Belt Parkway?

A. Bay Parkway.

[fol. 26] Q. That is outside of Brooklyn?

A. There is Bay Ridge and there is Bay Parkway.

Q. It was in the water outside of Brooklyn, is that right?

A. Yes.

Q. How long did you work at the Bay Parkway Brooklyn Section?

A. I think we were there, let me see, in February, March. I think from March to August to finish the job.

Q. Then you say the last three weeks of August you worked as a watchman?

A. Yes.

Q. Where was the dredge then?

A. She parked around the end of the Coney Island, the other side. Coney Island, over there.

Q. Was the place different from Bay Parkway place when you were a watchman?

A. Same thing, no different. You see if you take Bay Parkway this way, and that is to the end.

Q. What work did you see the dredge do?

A. Pump the sand.

Q. Pump sand and do what?

A. Make it land.

Q. That is to pump the sand under the water and pump it to a place on land, is that it?

A. Yes.

Q. About how big was the dredge?

A. She is big enough.

Q. Big enough does not mean anything to me. How long?

A. I don't exactly know, it is big boat. I can't say how long.

Q. What kind of machinery did it have on board?

A. I don't know, it is big machine and she can pump twelve, fifteen miles from where she stand.

Q. Was the dredge able to go on its own power?

A. No.

Q. How did it get from one place to another?

A. They have big boat to tie it up and pull it.

[fol. 27] Q. You mean a tugboat?

A. Yes, big tugboat always. Dredges never work themselves. I used to work on dredges year ago.

Q. Did it have any pipelines running from the dredge to the land?

A. Yes.

Q. How were those pipelines fastened? Did they go into the water and did they rest on something in the water?

A. They got the thing.

Q. Pontoons?

A. Yes, pontoons, otherwise they can't go. They get special men divers which go down in the bottom and put pipes down and then come up. When we finish job the same men go down again to pull pipes out. I don't know how, but somehow.

Q. Were there any lifeboats on this dredge?

A. We have, what do you call those things which every ship have? Those things you put on?

Q. You mean life preservers?

A. Yes. We all have that.

Q. Did you take part in any lifesaving drill?

A. No.

Q. Who was your boss?

A. On the dredge? My boss is the man in the kitchen, the chef. He is still working on dredge.

Q. What is his name?

A. Leon Tavlis.

Q. Who were these men to whom you served meals? Were they members of the dredging outfit?

A. All the people work in the dredge from chef, engineer, everybody.

Q. Did this dredge carry any cargo or freight?

A. What do you mean?

Q. Did it carry merchandise or freight or cargo?

A. No.

Q. Did it carry any passengers?

A. No, of course not.

[fol. 28] Q. Was there a captain on board the dredge?

A. Captain? Yes, he is on board all the time.

Q. Did you take any orders from the captain?

A. Of course, he is boss for everything.

Q. What orders did he give you?

A. If you don't do your work he fires you.

Q. Is he in charge of the boat?

A. He is in charge of everything. If you don't do your duties he fires anybody.

Q. Where did you sleep on board the dredge, in hammocks or berths?

A. We have rooms just like the big boats, like one on the other.

Q. With bunks?

A. Yes, bunks.

Q. Did you have to have any certificate or license to work on board the dredge?

A. No.

Q. Did you have to have any license?

A. I didn't have any license. I give them my Social Security card and I give my citizen papers and they give me job.

Q. Have you got any seaman's papers?

A. No. That is first time I work in my life and I like it too.

Q. Did they take off Social Security deductions from your pay?

A. Well, I don't know. When the Company hired me they asked me for my Social Security card and my citizen papers and I give it to the man of the boat, I don't know what his name and he gets everything and then they give it to me back.

Q. Did you have one per cent taken off your pay every week?

A. You see, they go——

Q. I am asking you, did they take off one per cent from your pay?

A. That I don't know what they do.

Q. When they paid you $19.00 a week, did they take off nineteen cents every week?

[fol. 29] A. I didn't see anything like that. They paid me $19.00 a week. I don't know what they do. One thing I know, I go to the branch office and I take the card and I report when I start to work.

Q. You mean the unemployment insurance office in 14th street?

A. Yes. And I go there and then I tell——

Q. Just a minute.

The Referee: Any questions Mr. Rosen?

By Mr. Rosen:

Q. Mr. Cassaretakis, where were you hired?

A. The chef of the kitchen sends me a post card and I start to work there. Soon I start to work they ask me if I am citizen and if I have social security card.

Q. I mean were you hired on the boat or were you hired in an office here in New York or anywhere else?

A. On the boat.

Q. How did you get to the boat from land?

A. We take the little steamboat. It comes every morning at the dock and they take us.

Q. Whose steamboat is that, do you know?

A. The Company.

Q. What is the name of the steamboat?

A. I don't know the name.

Q. What dock did you take it at?

A. It is in Bayonne. Only one time a week they do that. Rest of the days I sleep there. After we move to Brooklyn I take them very often; it was very cold there.

Q. You stated that when the dredge was *in drydock in* Brooklyn——

A. Yes, then I go home every night.

[fol. 30] The Referee: Let him finish the question first.

Q. You said that when the boat was in drydock you had a lot of people on the boat and some people would come in and I understand that they would pay for their meals?

A. Yes.

Earl Q. Kullman: Will you please repeat that question?

Q. Did you say at any time that people would come on the boat and eat and pay for their meals?

A. Yes.

Q. When was that?

A. On Bay Parkway, the people working.

Q. Working for Standard Dredging Company?

Earl Q. Kullman: Didn't he say that nobody paid for their meals?

Mr. Rosen: Only in drydock. I myself understood——

The Referee: I have a very definite idea what he said. I asked him to explain before how he served sixty or seventy people when there were only forty-five on board the dredge and he said that the people who worked along the side of the dredge, broadside, also ate aboard the dredge. That's what he said according to my notes.

By Mr. Rosen:

Q. Those people who came on in addition to the forty-five, were they employees of the Standard Dredging Corporation?

A. Yes.

[fol. 31] Q. Were those meals given to them free of charge or did they pay for their meals?

A. They paid a dollar a day, anybody pays a dollar a day he board there.

Q. You said the dredge pumped sand and delivered it on land?

A. Yes.

Q. Can you tell us, geographically speaking, on what land was that sand delivered?

A. Right on Bay Parkway, that is three blocks farther.

Q. You mean in what we call, Brooklyn? The lines extended from the dredge to Brooklyn?

A. I will explain you. There is the sea, there is Bay Parkway the end of the water. Here it is all finished ground and the water is ten feet deep. They put partitions down here by carpenters and they put the pipes down and they make all even ground.

Q. Is that ground in Brooklyn?

A. It is highway now, the Bay Parkway highway.

The Referee: You mean the Belt Parkway?

Mr. Cassaretakis: All right. That job belongs to the state contractor with that job.

By Mr. Rosen:

Q. Mr. Cassaretakis, were there any other waiters on this dredge?

A. Only one waiter.

Q. That was yourself?

A. Yes.

Q. How many cooks?

A. That's two cooks, night and day cook.

Q. Two shifts?

A. Yes.

Q. Any dishwashers?

A. One daytime and one night time.

[fol. 32] Q. Any other kitchen help?

A. No.

Q. Which shift did you work?

A. I work day shift. Every Sunday night or Friday, on once a week I shift to night shift and I cook for the people myself and the dishwasher and the waiter took eighteen or twenty people once a week. That is why they

give me from nineteen dollars, the company raise me from nineteen to twenty-three because I did that once a week.

Q. Did they have any porters on the ship to clean the dining room?

A. Oh sure, we clean that. The dishwasher after breakfast every morning scrub the dining room and scrub the kitchen. Everything is nice, rooms looks nice and clean. Changed the beds every Saturday.

Q. Who took charge of the changing of the beds in the rooms?

A. The stewards.

Q. How many stewards were there?

A. Only one, the chef.

Q. There was one steward?

A. That is all, he is the chef.

Q. He is the steward and the chef also?

A. Oh yes.

Q. Let us get this straight Mr. Cassaretakis. There were two cooks, two dishwashers, one waiter and one steward?

A. No, the steward up there used to take care of everything. When I was working the dishwashers do the kitchen and the floor and I take the linen and change the beds or and then I come back there and we prepare for lunch. Then we finish lunch, we take our rest and we prepare for five o'clock everybody eats.

Q. There was not any steward on the boat?

A. No.

Q. There was somebody else doing the steward's work?

A. Of course, sure.

[fol. 33] Q. Do you know whether the cooks were paid weekly or daily or how?

A. By the week, everybody get paid by week.

Mr. Rosen: That is all.

The Referee: All right, you may cross examine Mr. Kullman.

Mr. Rosen: One more question, may I?

The Referee: All right, go ahead.

By Mr. Rosen:

Q. What were the hours of the day shift?

A. The day shift is from eight to five.

Q. What were the hours of the night shift?

A. The night shift is from five to one. As soon as you get through it's all over.

Q. Did the day shift wait until the next shift came in to relieve it before it left?

A. The night shift come there five o'clock in the morning. In the meantime the day shift go and help kitchen finish the breakfast.

Q. The day shift would come and help the night shift finish the breakfast and then the night shift would go home?

A. Yes.

Q. In the evening would the night shift come on and help the day shift finish the dinner?

A. Yes.

Q. So during the day—I withdraw that.

Cross-examination.

By Mr. Kullman:

Q. Mr. Cassaretakis, did you keep a record of when you began work and how much you received?

A. Yes. I don't keep very good but I know I get paid by check. Have you got my checks with you?

Q. Just answer my question now. You have no record [fol. 34] of when you began work, have you?

A. What do you mean?

Q. You have no record of when you worked or how many weeks you worked, you have no written records?

A. No, but I know it's from February to August, February 4th.

Q. You are certain you began work on February 4th?

A. That's right.

Q. February 4, 1939?

A. Yes.

Q. You have no record of that, just a recollection. You just remember?

A. Yes, that's all.

Q. Wasn't it the next month you began work, wasn't it in March?

A. No.

Q. How do you remember it was February rather than March?

A. I remember because it was very snow and cold night when they called me from my house.

Q. Who called you?

A. The chef.

Q. What was his name?

A. He is in the dredge now.

Q. What is his name?

A. Leo Tavlis, you know the name.

Q. You are sure he called you in February and you began working on February 4th, 1939?

A. Yes, sir.

Q. When he hired you how much did he say he'd give you?

A. I tell you the truth. If he told me it was dishwasher I don't go. He played a trick on me; he took me for waiter and then I had to wash dishes.

Q. You could have given up the job the next day, couldn't you?

A. No, because I need work.

Q. Why couldn't you leave the next day if you didn't like the work?

A. Because if you know how much I need to work——

[fol. 35] Q. Then if he had told you it was a dishwasher job, you would have taken it anyway?

A. When I see it I say, well, I need to work.

Q. After you got the job you decided it was not so bad after all?

A. Yes.

Q. Better than nothing?

A. Absolutely.

Q. How much did he say he'd give you?

A. Nineteen dollars a week.

Q. Each week you got nineteen dollar- a week?

A. Yes.

Q. Exactly?

A. Yes.

Q. Not eighteen dollars and some odd cents but nineteen dollars?

A. He gave me nineteen but when he hired me he says he don't say exactly nineteen but the first pay he give me nineteen so what am I going to do.

Q. You got $19.00 a week?

A. Yes.

Q. Were you paid every week?
A. Yes, every week nineteen dollars.
Q. On what night were you paid?
A. Every Friday afternoon.
Q. Did you get a check?
A. Check every time.
Q. To your order? A check made out to Cassaretakis?
A. Yes.
Q. Nineteen dollars?
A. Yes.

Mr. Kullman: Your Honor, may I have before beginning the case, may I have consent to this reservation. I thought I had the complete salary records here but I find that I haven't. Now it may not be material when he began work or how much he got but then again it may be material. May I have a reservation that we can adduce additional evidence at a later time as to the amount of his pay and the day that [fol. 36] he worked. Now I will give you our trial memorandum and you can see that the case may be independent of how much he made and when he began to work because all his work was on the dredge. Could I have that?

The Referee: If the amount of his earnings becomes a matter of dispute, we ought to have it in his presence. I will tell you this. In the Local Office he claimed to have earned in the first quarter of 1939 the sum of $160.00 plus meals valued at $58.50; in the second quarter $275.00 plus meals valued at $58.50 and i. the third quarter $170.00 plus meals valued at $58.50.

Mr. Kullman: Did you break that down to a weekly basis, I can't just follow that where that ties in with his story.

The Referee: I can't break it down.

Mr. Kullman: The figure I have is a figure which includes board.

The Referee: At what rate did you allow board and lodging?

Mr. Kullman: Apparently I can't even give that figure without verifying with the other records that are not now available. May I suggest that we finish the case today, reserving the right to put in the employer's testimony as to the amount of pay and period worked. Set a date for an adjourned hearing and then if Your Honor decides that is not necessary why the adjourned hearing can be cancelled.

The Referee: Well, the man ought to be confronted

with your records as to whether he agrees with them or not.

[fol. 37] Mr. Kullman: I am asking for an adjourned hearing.

The Referee: Let's see how far we get on the status.

Mr. Kullman: Have I your consent to that, Mr. Rosen?

Mr. Rosen: Mr. Kullman, I want this case to be closed just as soon as possible.

Mr. Kullman: We just can't reconcile his story with the records we have. After all, this is not a small corporation. They have quite a few employees. I have no reason to doubt his testimony but I'd like to have a chance to verify it against the records. I don't think we will even dispute his story.

May I proceed with Mr. Paulson's testimony?

The Referee: Yes.

Walfred L. Paulson, having been duly sworn, testified as follows:

By the Referee:

Q. What is you- connection with the Standard Dredging Corporation?

A. I am Vice-President.

Mr. Kullman: Before the testimony, please.

(At this point an off-record conversation took place.)

The Referee: You may examine, Mr. Kullman.

[fol. 38] By Mr. Kullman:

Q. Mr. Paulson, will you state your office with respect to Standard Dredging Corporation?

A. Vice-President and Secretary.

Q. You are familiar with the general operations of the corporation?

A. I am familiar with the general operations, yes. That is to say, I am not familiar with detail operations of dredge work.

Q. What I mean is the general operations of the corporations, dredging operations, and operations of dredges and so forth.

A. Yes.

Q. General operations?
A. Yes.

Mr. Kullman: I have here two certified copies of the consolidated enrollment license of this dredge "Miami". These papers are commonly referred to as the documents of a boat. They are duly certified by the Collector of the Port of New York. May I introduce those by consent?

Mr. Rosen: No objection.

The Referee: Well, I don't see any need for the one for 1936. The one for 1939 will serve the same purpose.

Mr. Kullman: If by consent we have a concession that this dredge "Miami" was documented by deed during the period of his employment, why that will be sufficient. Frankly I am not going to try to mislead you. Notice the date of that certificate, it's April 1939. In order to show documentation over the whole period we will require both.

The Referee: We will take them both. A certificate issued by the United States of America, Department of [fol. 39] Commerce, Bureau of Marine Inspection and Navigation, entitled "Consolidated Certificate of Enrollment." The license is issued to the Standard Dredging Corporation, 80 Broad Street, New York, incorporated under the laws of the State of New Jersey referring to the Vessel called "Miami" and reciting that it was built in 1913 at Long Beach, California, of steel construction and is characterized as a dredge having one deck, one derrick, a plane head in the quarter stern. The registered length is 153 feet, her breadth 40 feet, depth 9.25 with total tonnage of 547 tons, which Certificate is issued at the Port of New York, April 8, 1936 by the Collector of Customs and certified as a true copy of the original. This is marked in evidence as Employer's Exhibit A.

Mr. Kullman: I was about to stop you from marking that.

The Referee: You will get it back.

Mr. Kullman: That happens to be a rather important record and if on the other one it made no difference I ask you to mark it on a separate piece of paper to be attached to it. One more point in your description, the official number. I don't think you know the official number of the vessel.

The Referee: I don't care for that. What difference does that make. I didn't describe everything. I just gave the

highlights according to the way I saw it. Marked in evidence as Employer's Exhibit A. Exhibit A is further characterized as being in the suction dredge service. Employer also offers in evidence a Certificate issued by the [fol. 40] United States of America, Department of Commerce, Bureau of Marine Inspection and Navigation entitled "Consolidated Certificate of Enrollment" and the license is issued to the Standard Dredging Corporation, incorporated under the laws of the State of New Jersey, concerning the vessel called "Miami", characterized as a dredge and in the suction dredge service and certifying to measurements and weights as contained in employer's Exhibit A which certificate is issued on April 27, 1939 by the Collector of Customs and certified to be a true copy of the original. This is marked in evidence as Employer's Exhibit B.

Before we go any further Mr. Kullman, will you explain to me why you say the correct title of the Company is the Standard Dredging Corporation, a New York corporation and these certificates are issued to Standard Dredging Corporation, a New Jersey Corporation.

Mr. Kullman: We will show they were chartered to a New York Corporation. With respect to an explanation of the difference in names there, on September 1, 1937 there was a merger and consolidation between the Standard Dredging Company of New Jersey and the National Dredging Company, the continuing corporation being the Standard Dredging Corporation which is the registered owner of those dredges. Now I have here a certified copy of a merger and consolidation.

[fol. 41] The Referee: You need not encumber the record with that. I will take your word as Counsel.

Mr. Kullman: I think we can agree that the legal effect, if necessary, can be proven by New Jersey Law.

The Referee: I will take your explanation as to how the Standard Dredging Corporation of New York comes into the picture.

Mr. Kullman: These dredges are chartered by the New Jersey Corporation to the New York Corporation.

The Referee: For the purpose of this hearing I want to know who is acknowledged to be the employer of this man.

Mr. Kullman: The New York Corporation.

The Referee: And the New York and the New Jersey Corporations bear exactly the same names, do they not?

Mr. Kullman: Correct. The New York Corporation is a subsidiary of the New Jersey Corporation.

The Referee: So that the hiring of this claimant and others similarly situated was under a charter arrangement whereby the New York Corporation engaged the services of a dredge owned by the New Jersey Corporation, is that correct?

Mr. Cassaretakis: When we work——

The Referee: Just a minute now. Is that correct Mr. Kullman?

Mr. Kullman: Right. One possible distinction. They chartered the dredge itself and not the services of the dredge.

[fol. 42] The Referee: In other words, it was like a lease from the New Jersey Corporation to the New York Corporation.

Mr. Kullman: They leased the boat itself.

The Referee: Go ahead.

Mr. Kullman: Can I take that to be conceded without testimony. Mr. Rosen, would you concede that without testimony. Mr. Paulson can testify to that if you wish, that the dredge is chartered by the New Jersey Corporation to the New York Corporation.

Mr. Rosen: I will take your statement as to that. Was that in effect at the time this man worked there?

Mr. Kullman: Oh yes.

Walfred L. Paulson, Vice-President recalled:

By Mr. Kullman:

Q. Mr. Paulson, I show you a copy of a letter dated November 9, 1938 and ask you if this is the carbon letter directed to the District Engineer, Army Building, Whitehall Street, New York?

A. Yes.

Mr. Kullman: I offer that in evidence.

Mr. Rosen: I have no objection.

The Referee: Carbon copy of a letter dated November 9, 1938 written by Standard Dredging Corporation to the District Engineer, New York District, 39 Whitehall Street,

requesting a permit for dredging an area described on a [fol. 43] certain map and estimating that two or three million yards are to be removed and that the material is to be deposited on the New York City Department of Parks Parkway fill as shown on the map. Marked in evidence as Employer's Exhibit C.

By Mr. Kullman:

Q. Mr. Paulson, do you know——

The Referee: Before you go any further, will you please describe who is the District Engineer, what are his duties, functions and authority. I will take your statement as Counsel, if you know.

Mr. Kullman: I am not as familiar with it as Mr. Paulson. I prefer that he testify.

Walfred L. Paulson: Whenever we take any material out of a navigable stream or bay, we have to make application to the Government engineers for our permit to take the material and file a map where the material is to be taken from.

Mr. Kullman: Now, with respect to Mr. Paulson's testimony I'd have to reserve the right to show—you see he is testifying as to matter of law of which his testimony would be incompetent—if there would be any dispute. I take it that testimony is only for the purpose of explanation.

The Referee: Put it in and we will see what it is worth.

By Mr. Kullman:

Q. I show you a mimeographed notice from the War Department, United States Engineers Office, on the back [fol. 44] of which is a map, and ask you if this was received by your office after the sending of Employer's Exhibit C?

A. Yes, it is.

Mr. Kullman: I offer it in evidence.

Mr. Rosen: I have no objection.

The Referee: Mimeographed public notice dated November 16, 1938, issued by the War Department of United States Engineers Office, 39 Whitehall Street, referring to the fact that application has been made by Standard Dredging Corporation for War Department permit to dredge in Gravesend Bay, Brooklyn, New York City and that a rough

sketch is shown on the reverse side of the sheet. Proposed dredging is to be depth of twenty-five to fifty feet below mean low water and dredge material is to be deposited shoreward of a proposed bulkhead to be constructed by the Department of Parks, City of New York, in connection with Shore Parkway. Any criticism of or protest is to be filed before November 26, 1938. Signed by H. V. Cy, Naval Corps, Engineers.

Mr. Kullman: Your Honor, I think the very highlight of that Exhibit you omitted. The purpose of the notice is to determine whether there is any objection from a navigation point.

The Referee: The paper also states that the decision as to whether or not a permit will be issued for land fill must rest primarily on the proposed work of navigation. This is marked in evidence as Employer's Exhibit D.

[fol. 45] By Mr. Kullman:

Q. I show you a letter dated December 2, 1938, from the War Department, directed to the employer and ask you if this letter was received by your Company?

A. Yes, this letter was received by our Company.

Q. Now with this letter, was there attached a document called a permit of which this is a photostatic copy?

A. Yes.

Mr. Kullman: Now I offer these as one Exhibit. I will explain the necessity for a photostatic copy. The original has been lost and this is a photostatic copy.

The Referee: I will take that. Letter from War Department, United States, Department of Engineers Office, dated December 2, 1938, addressed to Standard Dredging Corporation referring to application dated November 9, 1938 for War Department permit to dredge in Gravesend Bay and stating that a permit for that work is being issued. Signed by C. L. Hall, Colonel, Corps of Engineers. Attached thereto is War Department permit. This is marked in evidence as one Exhibit, Employer's Exhibit E.

By Mr. Kullman:

Q. Now during all the time—I withdraw that. Can you tell us about how long this job, so to speak, took?

Mr. Rosen: Which job is that?

[fol. 46] Mr. Kullman: This filling of the Belt Parkway Lane.

A. I don't know exactly, we done so many jobs. I think we were about eight months on this job.

Q. During all the time • • •

Mr. Cassaretakis: Bay Parkway, no.

The Referee: Don't interrupt.

Q. During all that time, can you say whether or not the dredge was anchored in the area shown by the map attached to Employer's Exhibit E?

A. Yes.

Mr. Rosen: What area is that?

The Referee: Will you describe it so we know what we are talking about?

Mr. Kullman: Possibly this would be sufficient.

Q. During all the time occupied in these dredging operations, was the vessel stationed in navigable water?

A. Yes.

Q. Within the area shown by the map?

A. Yes.

The Referee: Will you describe for the record what that area is?

Walfred L. Paulson: That is the area outside the pierhead line.

The Referee: What vicinity?

Walfred L. Paulson: Vicinity of Gravesend Bay.

The Referee: Is that water outside of the land known as Brooklyn, New York?

Walfred L. Paulson: Yes.

[fol. 47] The Referee: Is that within the waters of the State of New York?

Mr. Kullman: That will appear as a matter of law Your Honor. We can establish the boundaries of the State.

The Referee: It does not cross the Jersey line?

Walfred L. Paulson: To my knowledge, it does not.

The Referee: In other words, it is adjacent to the land and City and State of New York?

Walfred L. Paulson: Yes.

The Referee: Go ahead Mr. Kullman.

By Mr. Kullman:

Q. Now I show you a letter dated January 4th or rather a photostat of a letter dated January 4, 1937, from the United States Treasury Department and directed to Mr. Clarence W. DeKnight. Now first can you tell us who is Mr. DeKnight?

A. He is our Attorney in Washington, D. C.

Q. Did he send you the original of that letter or the original of which that is a photostat?

A. I can't say as to whether I have the original letter. I have the photostat of the original, this photostat.

Mr. Kullman: Will you accept that as sufficient foundation of proof? We can get you the original.

The Referee: There will be no quarrel with its being a photostatic copy. I will take it for what it is worth but I tell you at the outset I am not bound by any ex parte [fol. 48] decision of any agency, Federal or State or otherwise. I will decide this case on the evidence in this case rather than ex parte decisions of other agencies. Marked in evidence as Employer's Exhibit F. Employer's Exhibit F is a photostatic copy of a letter of the Treasury Department, Office of the Commissioner of Internal Revenue, dated January 4, 1937, addressed to a Mr. Clarence W. DeKnight, Washington, D. C. and stating in effect that the Treasury Department now holds that dredges intended and adapted for navigation and transportation by water, of their crews, supplies and machinery, from point to point, in carrying on the work of deepening and removing obstructions in channels and harbors in aid of navigation and commerce, are vessels within the meaning of Section 811 and Section 907 of the Social Security Act and that where such dredges are operated by the Standard Dredging Company of New York in navigable waters of the United States and the services performed by the Officers and Members of the Crew, come within the exempting provisions of Section 907, and wages payable to employees on account of such service, need not be included in the computation of wages for the purpose of determining employer's taxes. If such dredges are documented under the laws of the United States, the service and members of the crew, come within the exempting provisions of Section 811 of the Act.

Mr. Rosen: I wish the record to show that it is not binding upon the Division of Placement and Unemployment [fol. 49] Insurance of the State of New York.

The Referee: Well, that is your argument and we will take that at the proper time. Go ahead Mr. Kullman. Are you through with this gentleman?

Mr. Rosen: I just wanted to ask Mr. Paulson a few questions.

The Referee: Go ahead.

By Mr. Rosen:

Q. Where is the principal place of business of the Standard Dredging Corporation, the New York Corporation, the employer in this proceeding?

A. 80 Broad Street.

Q. New York City?

A. Yes.

Q. Does it have any other place of business?

A. Yes, it has several places of business.

Q. Where are they located?

A. New Orleans, Louisiana; Galveston, Texas office, in Los Angeles.

Q. That is, the New York Corporation has those places of business?

A. No, wait a minute. The New York Corporation has an office in Galveston, Texas and Louisiana and Texas.

Q. In the State of New York, has it any other places of business?

A. No. I got mixed up with our New Jersey Corporation.

Q. Mr. Paulson, has the New York Corporation filed franchise tax returns with the State of New York and paid franchise taxes to the State of New York?

A. It has.

Q. Has it done so for the years——

Mr. Kullman: For all years.

[fol. 50] Q. When was the New York State Corporation formed? When was it formed?

A. I believe in May 1938.

Q. May 1938, is that right?

A. I believe that is correct, I believe that's the date. I believe so.

Q. And for 1938, 1939 and 1940 it has filed franchise tax returns and paid franchise taxes to the State of New York?

A. Yes.

Q. When it filed—that is all.

Mr. Kullman: I'd like to ask a few more questions. This is more in the nature of direct rather than redirect.

The Referee: Go right ahead. We don't draw any distinctions.

By Mr. Kullman:

Q. First of all, do you know where the dredge Miami is now?

A. The dredge Miami is at present located at Tampa, Florida.

Q. It is a sea-going dredge then?

A. It is a sea-going dredge.

Q. Will you state in a general way the various places that the dredge Miami has been?

A. The dredge Miami after finishing Belt Parkway job at Gravesend Bay, after that, we towed that dredge to Jacksonville, Florida and we done a contract there on the naval base there and within the past months we towed the dredge by tugboat to Tampa, in Florida.

Q. When that dredge goes from this State of Florida, about how many men would she have on board?

A. When she goes out to sea, we generally have about a half a crew, about twenty-five men, about twenty-five to thirty.

[fol. 51] Q. Now Mr. Cassaretakis, has testified that he did work in the kitchen?

A. He washed dishes, takes care of linen and a few other things.

Q. Now when the dredge Miami left from New York to Florida, did it have a man on board who did substantially the same duties as Mr. Cassaretakis?

A. Oh yes.

The Referee: That would be very interesting but that wouldn't be controlling as to what took place when this claimant worked on board the vessel. It may have been changed, that is, after he left. I don't know. I think Counselor you ought to confine yourself to the period of his employment. When this claimant worked there what took place.

Mr. Kullman: The nature of his duties would appear more as a matter of law than a question of fact.

The Referee: There is no dispute he was a dishwasher and waiter.

Mr. Kullman: General cook's helper.

The Referee: There is no dispute as to that. I think we all agree on that.

By the Referee:

Q. Mr. Paulson, has the dredge Miami any means of self-propulsion?

A. None other than the spuds. When that dredge is operating it has a means of propelling itself by lifting the spuds up and down and walking along.

Q. How is it taken from place to place?

A. It is generally taken by tugboat.

Q. It is tugged or towed by a boat having propulsion [fol. 52] power?

A. We have a steamer also that tows dredge boats and carries the auxiliary equipment.

Q. When you say by means of spuds, isn't it a fact that you mean by means of lines the dredge is shifted from place to place in and about its dredging operations?

A. Means of lines and spuds.

Q. These spuds are attached to what?

A. Attached to the dredge.

Q. And what leverage is exercised to make the boat move from spot to spot?

A. These spuds are lifted up and down by pulleys.

Q. When you say that this is a seagoing dredge, do you mean to imply that it carries cargo or passengers when going to sea?

A. Oh no.

Q. Is it a fact that the work of the Miami is confined to dredging operations?

A. Dredging operations pumped through pipelines.

Q. These pipelines rest on pontoons?

A. There is a legal opinion that pumping through pipelines is transportation.

Q. I am asking you, do these pipelines rest on pontoons when the dredge is operating on a particular spot?

A. Yes.

Q. Is it a fact that the material under the surface of the water is pumped up by suction pumps from beneath the surface through the pipelines on to the shore?

A. That's correct. Sometimes we have quite a lengthy pipeline ashore besides the pontoons.

Q. Well, the pipeline may run from dredge to shore without the aid of pontoons?

A. Yes, without the aid of pontoons right on the land.

Q. Now was the Miami engaged in the work of deepening or removing obstructions from channels or harbors at the [fol. 53] time this claimant worked aboard it?

Mr. Kullman: I think he already testified to the fact that this was dredging for fill for the Belt Parkway. We will stipulate that fact, if you wish?

The Referee: Your Employer's Exhibit F is based upon a holding of the Treasury Department, Commissioner of Internal Revenue, that dredges adapted for navigation and transportation by water of their crews, etc., in carrying on the work of deepening and removing obstructions in channels and harbors in aid of navigation and commerce are vessels within the meaning of the Social Security Act.

Mr. Kullman: You mean you draw a distinction whether the primary purpose is deepening a channel or whether there is a supplementary purpose in the use of the dredge?

The Referee: I have not drawn that distinction but the Appeal Board has drawn that distinction; that there is a difference between the work which is in the category of strictly in aid of navigation and that which is in the category of construction on land.

By the Referee:

Q. Now Mr. Paulson, will you answer to the best of your ability. Was the work of the dredge Miami in aid of navigation for the purpose of deepening, widening, a channel or harbor at the time this claimant worked aboard the dredge?

[fol. 54] Mr. Kullman: Just a minute Your Honor. I will have to object to what you say in aid of navigation. I think that is a conclusion of law as to what is in aid of navigation.

The Referee: I think you are justified in making that objection and I will reframe the question.

Q. Will you describe in your own words Mr. Paulson, what the work was of this dredge Miami during the early part of 1939 and continuing for eight months as you testified?

A. Well, we were digging material to make that fill.

Q. Will you give us a layman's definition of fill. What do you mean by that?

A. To make the fill behind the bulkhead to make a road.

Q. In other words putting in into layman's vernacular, they were building a roadway on land called Belt Parkway?

A. That's right.

Q. And they pieced out the irregularities of the land by filling in with material sucked from underneath the surface of the water, in the vicinity of that particular roadway, am I correct?

A. Yes. The City of New York in drawing up that contract figured they could get their material right from the Bay.

Q. That was what is known now as Belt Parkway, constructed by the Department of Parks in the City of New York?

A. Right.

Q. Territorially, it is located in Brooklyn for the most part, is it not?

A. Yes.

Q. Am I correct in saying that the purpose of this dredge work on this particular occasion was to supplement the [fol. 55] material on land so as to build or construct a roadway as part of this Belt Parkway?

Mr. Kullman: Again, the purpose of the operation might become a question of law. Would you restrict yourself to one of the purposes?

The Referee: I am going by your own Exhibits Mr. Kullman. Your own Exhibits say that the purpose of the permit is to remove a certain quantity of yards in the deposit of material on the Department of parks fill. Now I am assuming that was the purpose. It there are any other purposes I will be glad to take testimony on that.

Mr. Kullman: That's all right.

By the Referee:

Q. Are we clear on that Mr. Paulson, that the purpose of the original contract that you had with the authorities. I assume that was with the City of New York?

A. Yes.

Q. Was to obtain material from underneath the surface of the water to fill in the land at a particular point, to create a roadway, is that right?

A. That's correct.

Q. And when you made application to the War Department, that was the purpose of your operation, by the letter which is Employer's Exhibit C and that was the purpose as outlined in the permit given to you as in Employer's Exhibit E, is that right?

A. Yes.

Q. What I want to make clear so that we can define the issue in this case, is that whatever the status of the vessel [fol. 56] may be in the matter of law, in this particular instance, am I correct in saying that it was an operation concerned with the building of a roadway on land, is that right?

A. If the operation concerned the filling of a roadway on land by suction dredging process and obtaining material from the bottom of the Bay and depositing this material behind the bulkhead through suction pipes.

Q. I don't want you to misunderstand my question. I want you to tell me if there were any other purposes of this operation in which the Miami was engaged at this particular time?

A. Well, not that I know of except Moses thought it would be nice to clean the hole out there in Gravesend Bay. The water is very shallow there. Coal barges used to come in there and go ashore. He wanted it for yachts.

Q. When you say Moses, you mean Commissioner Moses, the Park Commissioner?

A. Yes.

Q. What did the contract between the Standard Dredging Corporation and the City of New York say, as to what the purpose of the operation was?

A. I don't know as to that.

Q. Was the primary purpose to create a yacht basin or build a roadway?

A. The primary purpose was to build a roadway.

Q. In line with this Employer's Exhibit F, I want to know if any of the work done by the Miami in this particular case, was in connection with the deepening and removing of obstructions from a channel or harbor?

A. Yes, it was removing material from a narbor, if you call Gravesend Bay a harbor.

Q. Was it for the purpose of deepening the harbor and channel?

A. No answer.

[fol. 57] Mr. Kullman: Just a minute. Your Honor. Again I don't think it is important but I think if he answers your question, he would be testifying as to what is a question of law. That is a question of law. The Exhibits indicate the nature of the precautions taken by the Federal Government. They indicate that the sole interest of the Federal Government as to whatever is done on navigable water is the effect that it will have on navigation.

The Referee: That is a protective matter.

Mr. Kullman: I don't think so.

The Referee: As you say, you can leave that for either argument or proof by law. Let me tell you the purpose of my questioning. You have put into evidence a ruling by the Treasury Department, marked Employer's Exhibit F and that states very succinctly that a ruling is being made that dredges, intended and adapted for navigation and transportation by water of their crews, supplies and machinery, from point to point, in carrying on the work of deepening and removing obstructions from channels, and harbors, in aid of navigation and commerce, are vessels within the meaning of the Social Security Act. I assume you are relying on that. I want to know whether any of the work done by the Miami on this particular occasion was in connection with the deepening and removing of obstructions from channels and harbors in aid of navigation and commerce.

[fol. 58] Mr. Kullman: May I point out that the removal of sand from water, is a deepening of which you are required to take judicial knowledge. You can't remove a few million cubic yards of sand from the Bay without deepening the water.

The Referee: We are concerned with the primary purpose. If the primary purpose is to build a roadway, the secondary purpose becomes the deepening of the surface

under the water because you are excavating and removing material.

Mr. Kullman: The very purpose of that is a maritime purpose.

The Referee: Was the contract between Standard Dredging Corporation and the City of New York for the purpose of deepening the waters in Gravesend Bay?

Mr. Kullmen: From the point of view of the City, the City was not interested in the navigable waters, that is the concern of the Federal Government.

The Referee: Now I don't want to take the position of Counsel here. Let's not fence. I want to make the thing clear in my own mind, and that's this. Is it not a fact from what Mr. Paulson has already stated, that the primary purpose of the contract between Standard Dredging Corporation and the City of New York was to obtain fill from the waters of Gravesend Bay and deposit that material on land to make a roadway?

Mr. Kullman: Just a minute, Your Honor. With respect [fol. 59] to that I think the testimony, if it states that, is a little inaccurate.

The map shows an area to be filled in, which prior to the filling in was water, varying from twelve feet to five feet. So this was filling in the edge of the sea to make it land, much more so than it was to increase the height of the land, that is, the making of land out of what was formerly the sea.

The Referee: Although there is no testimony on that I will accept your testimony that that is a fact.

Mr. Kullman: The Exhibit shows it as a matter of fact.

The Referee: Now let me continue with a few more questions and then Counsel can inquire.

MR. PAULSON RECALLED

By the Referee:

Q. Who was in charge of this dredge, Mr. Paulson?

A. We had a superintendent in charge of the operations by the name of Guy W. Sackett.

Q. Was there a captain aboard the dredge?

A. Besides Mr. Sackett, there was a Captain aboard the dredge.

Q. Who had charge of the operations?

A. Mr. Sackett had entire charge of the operations. Under him was the Captain of the dredge and under the Captain was the mates and operators.

Q. Will you describe the positions held by the various men working aboard the dredge? After the Superintendent [fol. 60] and Captain came which jobs?

A. The men that come next are the operators, levermen.

Q. They operate the machinery?

A. Yes.

Q. Who else?

A. Then the mates.

Q. What work did the mates do?

A. They boss the sailors around.

Q. When you say sailors, what work in the category of sailors do these men do?

A. The sailors work on board the dredge.

Q. I want you to describe to me what work they actually did?

A. When the dredge is operated they have various duties to do.

Q. Are the sailors the levermen?

A. The levermen are generally sailors, generally men that come up from the deck and go up to leverman.

Q. Start as a deckhand?

A. Yes.

Q. What work does a deckhand do?

A. Ordinary sailor working on board.

Q. I have never been aboard a dredge. You will have to describe it for me. When you say ordinary work, you have to describe it for me?

A. They have varied duties. I can't describe it myself as I am not a dredge man.

Q. You have been aboard a dredge, you have seen it operate?

A. I have seen the deckhand working there lines and different things.

Mr. Kullman: Would you, Your Honor, want detailed testimony as to dredging operations?

The Referee: I think we ought to know what these men do. When you label a man a mate or a sailor, that has a maritime connotation. I think we ought to have an elabora- [fol. 61] tion. It may be these are misnomers. It may be

they are correctly named. We have had barge cases where the one man aboard is the boat, the Captain, the Crew and yet, he is called the barge captain. He is in the category of an ordinary laborer and yet he is dignified. I want to have an exact description of the work done by these so-called mates and dredge men.

Walfred L. Paulson: I will have to get you a dredge man.

The Referee: You had better have one here the next time.

By the Referee:

Q. How many decks has this dredge?

A. One deck, the main deck and sleeping deck.

Mr. Kullman: That makes two.

Walfred L. Paulson: Yes, two decks.

Q. Does this dredge ever carry passengers or cargo?

A. No. As a matter of fact the crew also consists of the engineering part of the vessel. The chief engineer has generally three assistants and the oilers and firemen.

Q. What do they operate?

A. They operate the boilers and operate also the machinery.

Q. Which machinery do you refer to?

A. The machinery for moving the dredge to and fro, the machinery that moves to and fro.

Q. You don't mean in navigating the dredge?

A. In moving the vessel to and fro.

Q. When you move the vessel to and fro, you move it by spuds or lines?

A. Yes, but that takes machinery, and they work on that you see.

[fol. 62] Q. Is there any machinery aboard that would enable the dredge to operate under its own power in going from place to place, like any seagoing or rivergoing vessel?

A. No, you see they are generally towed by going, by a tugboat, when they are moved from place to place.

Mr. Rosen: A few questions.

The Referee: Mr. Rosen.

By Mr. Rosen:

Q. Mr. Paulson, Mr. Cassaretakis has testified that he was employed from approximately the beginning of Feb-

ruary until approximately the end of August 1939, on this boat Miami, on this dredge Miami. During this period this dredge Miami was engaged in the operations that you just finished testifying about, that is, in the neighborhood of Brooklyn, adjacent to land there in Gravesend Bay, excepting possibly for the period it was in drydock, now is that correct?

A. I don't know just when he started to work. He said something about starting to work over in Bayonne before she moved to Gravesend Bay.

Q. Can you tell us whether the work in Gravesend Bay extended at least from the beginning of February 1939 until about, say the middle of August 1939?

A. I can't tell exactly what is the period. To the best of my—my guess is six or seven months.

Q. Starting when?

A. No answer.

Mr. Rosen: Mr. Kullman, can you have that straightened out at the next hearing?

[fol. 63] Walfred L. Paulson: We operate several dredge boats; I can't tell just when.

By Mr. Rosen:

Q. Has the Miami what is known as a home port?

A. Yes.

Q. Where is that?

A. New York.

Q. Is it tied up to a pier or is there any particular place where it is home?

A. In a home port in New York? If you notice that document, it has a designation of home port.

Q. The document is made by the Bureau of Internal Revenue at the Port of New York. Is the Miami docked in New York when it isn't in use?

A. She is docked wherever we just happen to have a job and lay up. She will probably never come back to New York. She is in the south. She is down in Tampa, Florida now and will be down in the south. We move these dredges around from place to place.

Q. Where was that dredge in January of 1939?

A. I might explain that we have no regular terminal in the State of New York where we lay up our dredges.

Q. Where was it in January of 1939?

Mr. Kullman: I can supply that if you want it. I will have it.

Mr. Rosen: You will get it?

Mr. Kullman: Yes, if you want it, yes.

Mr. Rosen: For the whole year 1939 and also supply us the name of that drydock that Mr. Cassaretakis stated, which was laid up somewhere in Brooklyn. The name of the drydock or pier?

Mr. Kullman: All right, yes.

[fol. 64] By Mr. Rosen:

Q. Mr. Paulson, is the New York Corporation, the Standard Dredging Corporation, a covered employer within the meaning of the New York State Unemployment Insurance Law, regardless of Mr. Cassaretakis? In other words, have you other employees for which you have paid contributions and have filed reports under our law?

A. Yes, we have the men working ashore.

Q. Now under this Charter, between the Jersey Corporation and the New York Corporation, affecting this dredge Miami, as I understand it, correct me if I'm wrong, the New York State Corporation is responsible for the operations and control of that dredge during the life of that Charter, is that correct?

A. Yes, correct.

Q. The personnel on the dredge during the period in question was paid by the New York State Corporation?

A. Yes.

Mr. Rosen: That is all.

The Referee: Is there anything further?

Mr. Kullman: That is all.

The Referee: Case adjourned for further testimony.

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Certified to be a True and Correct Copy of Minutes
Abraham Weinstein, Hearing Stenographer, Abraham Weinstein.

Transcribed 11/13/40.
Cassaretakis 9/5/40.

[fol. 65] BEFORE DEPARTMENT OF LABOR—UNEMPLOYMENT INSURANCE REFEREES' UNIT

Hearing before Referee—September 11, 1940

Present Louis J. Naftalison, Referee. William Newrock, Reporter.

APPEARANCES:

Mike Cassaretakis, claimant.
Standard Dredging Corporation, Walfred L. Paulson, Vice President and Secretary.
George F. Gee, dredge captain, witness.
Ray Pippitt, clerk, witness.
Kirlin, Campbell, Hickox, Keating & McGrann, Esquires, by H. Maurice Fridlund, Esq., and Roy T. Parker, Esq., of counsel; for Standard Dredging Corporation.
Division of Placement and Unemployment Insurance, Legal Bureau; by Harry I. Rosen, Esq.

[fol. 66] THE CASE WAS DULY CALLED. DISCUSSION OFF THE RECORD

MIKE CASSARETAKIS, claimant, having been previously sworn is recalled and testtifies as follows:

By the Referee:

Q. When you filed an application for a hearing in the local office, you signed a statement which said, "I was employed as a waiter on a dredge (stationary) clearing the channels at the Bedloes and Fort Hamilton Vicinity on a contract job for the United States Government". Now where did you get the information that this was a United States Government job?

A. Well, from the dredge, inside.

Q. From the what?

A. From the captain and chief engineer and everybody else.

Q. Well, do you know it was a United States Government Job or a city government job?

A. No, that is state job. Altogether.

Q. Which is it, state, city, or United States Government, if you know?

A. Same thing, I guess.

Q. To you it's the same thing.

A. Well, state job and United States Government job is all the same.

Q. You have no personal knowledge as to what kind of a job it was, for which government?

A. Of course I know.

Q. You only know what they told you?

A. I know myself, that job was run by La Guardia or Lehman, together—Bay Parkway.

[fol. 67] Q. Did you see the way the dredge did the work?

A. Of course.

Q. And what did you see the dredge do?

A. Just dig the bottom of the water, pump all kinds sand and stones, everything that you get down there, to fill up the bad lands.

Q. The bad lands?

A. Yes.

Q. And where was this land situated?

A. From the Bay Ridge—Near the Bay Ridge to the other place—near Coney Island.

Q. And that is in Brooklyn, New York?

A. Of course.

Q. All right, and if the evidence here shows that this was a city job you have no quarrel with that as distinguished from a United States Government Job, have you?

A. No, I don't know, I only know when I get this job—I told you I was in employment office in Fourteenth street—as soon as I get this job I report there, he says, and soon you finish this job you report there. I don't know government job I just want the law.

Q. Is there anything else you want to tell me that you didn't tell me at the last hearing?

A. Well, last hearing I forget to told you it. When they hired me there he told me, the steward told me, "You pay dollar a day, your wages twenty-six dollars a week, but the company keep one dollar a day for your meals and everything else and nineteen dollars be clean for you." He told me that and he told me, if you satisfactory, I don't have to claim nothing.

Q. When we get the proof of your earnings from the Standard Dredging Company's representative here, I'll come back to you and check if its correct.
A. Yes.

[fol. 68] DISCUSSION OFF THE RECORD

By the Referee:

Q. Outside of that, anything else you want to tell me?
A. No.

GEORGE F. GEE, witness, having first been duly sworn, testified as follows:

By the Referee:

Q. What connection have you with the Standard Dredging Company?
A. I act as dredge captain in various parts of the work.
Q. Are you acquainted with the actions of the dredge called "Miami"?
A. Yes.
Q. And do you know about this particular city job in connection with the filling in of the land——
A. At Gravesend Bay.
Q. —at Gravesend Bay?
A. Yes.

Examination by Mr. Fridlund:

Q. Mr. Gee, will you tell us something about the—how the dredge "Miami" was manned, how many men, what is it customary——
A. The dredge "Miami"?

The Referee: Wait a minute, may I suggest you give him one question at a time? You've asked three. Break it up. Try one at a time.

Q. Well—well, how many men do you customarily have in the crew "Miami"?
[fol. 69] A. From forty-two to fifty. That includes the three crews for the three different shifts.

Q. How is that crew made up?

A. That consists of a deck captain—deck department and the engine room department. The captain in charge of the dredge is substituted by a dredge captain and dredge mate and then there are the three operators who operate the dredge to do the shifting, and under the mate there is deck-hands. Now, the engine room consists of chief engineer, first and second and first assistant engineer, fireman, oilers and wipers. The chief engineer has jurisdiction of the engine department, captain looks after the outside work.

Q. Now, how about——

A. And the commissary consists of a cook, a steward, and a helper—cook's helper—and they usually look after the commissary and do the cooking and janitor work and making up the beds and keeping the rooms clean. That is only aboard the dredge.

Q. Are all of the crew, that you mentioned, aboard the dredge under the orders of the captain?

A. Direct orders of captain.

Q. Or——

A. Or the deck captain.

Q. Now, in addition to the crew aboard the dredge, do you also have a shore crew?

A. The shore crew consists of—solely on the size of the contract and the job and usually from fifty to a hundred men. They are made up entirely of what we call pipemen—laborers—laborers, and they usually have a dump foreman. Sometimes the work spreads so far apart that we have an assistant foreman with a dump foreman, and those men do shore work entirely at all times.

Q. Did I understand you to say they are under the direction of whom?

[fol. 70] A. Well, the captain of the dredge. It's necessary for him, at times, to come out and give orders to the dump foreman in regard to the grading. There are times when the fill may be getting too high above the engineer's grading and the captain, he is responsible to know for the company, and there is times when he has to go out and make his rounds on the first, and he does give orders to the dump foreman—where to change and put the pipes—but aside from that under his direct orders are the shore crew men.

Q. Yes.

A. Usually some times the captain—the superintendent or civil engineer as we call them, looks after grade and cooperates with the engineer and state engineer, whatever contract we may be on.

Q. And what are the duties of dump foreman?

A. To see that the pipelines are laid and put in the place either by the dredge captain or the superintendent. When I say the superintendent, he is merely the civil engineer.

Q. Does he also boss the shore crews—laborers?

A. Sometimes, when the dredge captain is on the dredge.

Q. Is the shore crew sharply differentiated in any way from the dredge crew?

A. Well, I would say they are. I would say that as long as I have worked for the company I was under orders not to allow any of the shore crew on the dredge.

Q. Are those your own orders or the present regulations of the company?

A. Usually the regulations of the company. They have no business on the dredge. Their work is entirely ashore and it's purposely because they come on there. They are liable to pick up tools and go into the commissary and [fol. 71] bother the cook and perhaps take coffee and food. In other words they haven't any purpose on the dredge.

Q. Mr. Gee, some testimony was given here last time to the effect that some of the shore men came aboard the dredge to eat. You know whether that is so?

A. Well, if they do they might sneak over and get coffee or something like that, but it's against the company's orders for any shore men to come within the commissary.

Q. Now are there any other men, that is other than the dredge crew, who were affected aboard the dredge?

A. Who ate aboard the dredge?

Q. Yes.

A. Engineering.

Q. What engineering?

A. Civil.

Q. City or company?

A. Army I would say. Army or state.

Q. Yes?

A. And usually sometimes the officers from the company from our New York office, they come aboard for inspection,

and launchmen—we have small launches that wait on the dredges, that bring the barges back and forth—and those launches are too small to carry a cook or do any cooking and those men eat on the dredge.

Q. I see, now, at the time of the Gravesend Bay contract, where was the dredge operated?

A. Well, I would say it was operating on the east side of the main channel. I would call it the east side. Due east of the main channel—termed as the main ship channel from New York Bay to the Narrows. That is the entrance of the Atlantic Ocean.

Q. Was that within the area prescribed by the army engineers?

A. Army engineers, yes, sir.

Q. Now, when the dredge picked up fill from the excavated area——

A. Yes.

[fol. 72] Q. What did it do with it then?

A. Why it pumped it ashore. In the beginning of the work we started to put the material excavated by the dredge into the water below mean low water and then had it raised to another elevation set by the state engineer or the army engineer. That is it was deposited inside of the low water line.

Q. Now, in the course of these operations at the excavated area, was it necessary to remove any obstruction?

A. Well, there were stones and boulders and things like that mixed into the sand. Whenever anything like that happened, that I know of, they went outside of lines designated by the army engineers.

Q. Did you——

A. It was sand material.

Q. Did you operate in one particular portion of the area or anywhere?

A. The operations of the hydraulic dredge required that you keep moving ahead and free from side to side, see.

Q. How long did the operations at Gravesend Bay last?

A. Approximately—of course as I say, I was not in charge of the work at all times——

Q. I see.

A. —but the dredge—to the best of my knowledge—I believe—to the best of my knowledge—outside of the company records—I think it was somewhere in March—February,

March, April—somewhere in March, I believe, and then I think they finished somewhere in August.

Q. I see.

A. Now, I'm not quite sure.

Q. Now, after the Gravesend Bay contract was finished in August, then what happened to the dredge?

A. The dredge was towed off of the site of work. In other words, from the area designated by the army engineers to excavate, it was taken from there to the foot of twenty-fifth [fol. 73] street dock, the name of that is Coney Island. I believe that is the street.

Q. And there——

A. It was tied in—well it laid in twenty-two feet of water under the dredge. Water went up to float the dredge.

Q. Did you still maintain the crew on board?

A. No, they kept a skeleton crew.

Q. Skeleton crew?

A. They were members of the crew.

Mr. Fridlund: I think that is all I have.

Cross-examination.

By Mr. Rosen:

Q. When this dredge was operating in Gravesend Bay——

A. Yes.

Q. —how far from the New York shore was it?

A. From the New York—from the Brooklyn side?

Q. From the Brooklyn side?

A. Well, now——

Q. Approximately.

A. I never measured it. I would say that dredge was in the neighborhood of sixteen-hundred—in the neighborhood of sixteen hundred to two thousand feet off of the shore line. Now, of course those are approximately the figures. Judging the distance.

Q. During the course of your work? During the course of the dredging?

A. Yes, sir.

Q. Was the work inspected by New York City engineers?

A. Of course the work on the shore—I don't know, I wasn't there at all times but I did see inspectors around there.

Q. Do you know whether they——

A. Assuming that they were usually that is the procedure.

Q. Mr. Gee, what is meant by rip-rap?

[fol. 74] The Referee: What is the word?

Mr. Rosen: Riprap.

A. Riprap is a term—a practical term from quarries. In other words, riprap is above what they call one and two man stone. Riprap is a stone that is too large for one or two men to pick up. Now riprap would usually run from one thousand to a—thousand pounds—to a ton.

Q. I see. Mr. Gee, how long was the dredge laid up at the Coney Island dock?

A. Those figures I haven't got. I never kept records of it but I did move the dredge from Coney Island to dock myself, I was assigned to do that. The dredge I believe tied up sometime in August and I moved the dredge on September 15. In other words I had orders to move the dredge on the first of September down to a safe harbor at the foot of Clinton Street, Brooklyn. It was hazardous where it was laying.

Q. How did you move it?

A. With tow boats. The Moran Towing Company.

Q. And when you moved the dredge from the scene of its operations in Gravesend Bay to Coney Island, how did you move it?

A. I believe I wasn't there, but I believe it was moved by our own small tow boats. It was a distance of not more than three thousand feet.

Q. And when the dredge moved from place to place in the course of its operations was the use of a tow boat necessary?

A. No, you mean off the area of the excavation.

Q. Yes.

A. No, the dredge maneuvered by means of the anchors. There was an anchor on the port end side that is set out on right angles for fleeting and then there is a spud in the [fol. 75] bank just like my fingers, one spud is up at all times and the dredge works around on that spud and when the dredge wants to set ahead they leave one spud down, take the other one up.

Q. You mean the tide will move it around?

DISCUSSION OFF THE RECORD

The Referee: Photograph of the dredge "Miami" is marked in evidence as employer's exhibit G. Employer's exhibit G—strike that out——Now will you indicate on employer's exhibit G—this photograph—by a pencil mark what is indicated to be the spud you just spoke of. Put it out here (indicating). Is that the same thing? Are they identical?

Mr. Fridlund: I believe so.

The Referee: Go ahead.

A. Now, the operation of a dredge, when the dredge wants to move ahead you see by—one of those spuds are lifted. You understand?

Q. Yes.

A. The other one is down. Now then they are sweeping the dredge on that one spud. Well, when they do see then they drop the opposite spud—they hold the opposite spud and then they swing the dredge around and they drop the spud. Then they pick up the other spud and swing the dredge in the opposite direction. In other words, this is the motion (indicating). Like that.

Q. Mr. Gee, what swings the dredge?

A. The engine in her.

Q. I see.

A. Attached to these cables are the anchors.

[fol. 76] Q. I see.

A. And when they want to swing one way they slack——

Mr. Fridlund: In other words, Mr. Gee, is it correct that on the job the dredge moves from place to place as operations are required, under her own power?

The Referee: When you say power, you mean motive power or the power——

DISCUSSION OFF THE RECORD

The Referee: Or the power of a fulcrum?

Mr. Fridlund: Well motive power applied from the engines on board the vessel——

DISCUSSION OFF THE RECORD

A. Going back to your question, the dredge moves by its own power for a distance of—at any distance on a straight

cut. When the dredge has to come back—often times in our operations over the same area—Now I'm not getting away from that—if its got any distance to come back in quick time we usually pick up the anchors and our own tug boats bring it back. Its our own tug boats that bring it back.

The Referee: What I want to know is, when you say "its own power" it hasn't got its own power.

Mr. Gee: It's not a propelled dredge.

The Referee: And before we leave this picture, I want you to mark it up some more. For my benefit will you indi-
[fol. 77] cate the pipe lines by an arrow and the word pipeline? And what is the diameter of this pipeline?

Mr. Gee: That's 27 inches.

The Referee: And it's made of what composition?

Mr. Gee: Iron and steel.

The Referee: And it's riveted at various sections?

Mr. Gee: Welded and——

The Referee: And those pipelines rest on pontoons between the derrick and the shore, is that right?

Mr. Gee: Yes.

The Referee: And will you indicate to me what this is?

Mr. Gee: That is a frame.

The Referee: What does that mean in non-technical language?

Mr. Gee: You'd call it a stationary press derrick.

The Referee: And what is suspended from this press derrick?

Mr. Gee: That is a ladder coming down, here it's on the water, of course. We call this the ladder falls.

The Referee: The ladder what?

Mr. Gee: Falls f-a-l-l-s.

The Referee: And what does that, that you described as the ladder falls which goes into the water, do?

Mr. Gee: That is the flexible contrivance that has the suction pipe bolted on to it and it acts on a swivel or a ball joint, like your wrist, and that has a suction pipe attached to it on the bottom.

[fol. 78] The Referee: In other words, the suction pipe is suspended underneath the surface of the water by means of this falls ladder?

Mr. Gee: That's correct, and that permits our dredge to make different depths.

The Referee: And does it—any of the suction machinery show on this picture?

Mr. Gee: No, sir, it doesn't.

The Referee: Is that underneath the surface of the water?

Mr. Gee: It's in the bottom of the dredge.

The Referee: I see. Is there anything else in this picture that you think you ought to label?

Mr. Gee: How about these swinging wires that swing the dredge from place to place?

The Referee: Mark it, will you please?

Mr. Gee: Attached to anchor.

The Referee: Now does this photograph show any of the lines running from the dredge to the shore? Outside of the pipeline.

Mr. Gee: That's all.

The Referee: Are there any cables?

Mr. Gee: Not from the dredge, no, sir.

The Referee: Are there any electric cables?

Mr. Gee: No, sir.

The Referee: How is power generated aboard the dredge?

Mr. Gee: By steam and boilers.

The Referee: Any water lines between the dredge and the——

Mr. Gee: No, sir.

[fol. 79] The Referee: —and the shore?

Mr. Gee: Our water is brought in small barges.

Q. Mr. Gee, this picture, exhibit G, was that taken while the dredge was actually engaged in its work under the contract which is the subject matter of this proceeding?

A. Well, it hasn't—I couldn't say that myself, I'm sent from various plants, from one to the other, but I recognize that dredge as the dredge "Miami". There is nothing to indicate on the picture, but it is the company's usual procedure to take pictures of all our work under the operations on and before and after.

Q. Now Mr. Gee, the dredge——

A. Yes.

Q. —was engaged at all times in the area of excavation, as provided for in the contract, between the Standard Dredging Corporation and New York City?

A. Positively.

Q. Is that right?
A. Yes.

Mr. Rosen: I have no further questions. Mr. Fridlund, can you tell me for the record whether this is a picture of the dredge while it was actually in operation?

Mr. Paulson: This picture was taken at Jacksonville, while it was operating at Jacksonville, Florida.

Examination by the Referee:

Q. Mr. Gee, there was some testimony taken here last time that a superintendent by the name of Sackett was on this particular job. Do you know the gentleman?
A. Yes.
Q. Was he in complete charge of the dredging operations? [fol. 80] A. Not at all times. He was assigned by the company as—I would call it—general superintendent on the entire contract and he would naturally be over the dredge captain.
Q. What was the relationship between the dredge captain and Sackett?
A. There wasn't any relationship.
Q. Did he have supervisory powers over the dredge company——
A. Yes, so far as I know.
Q. And did he have supervisory powers over the land crew?
A. Yes.
Q. One——
A. And the engineers in charge.
Q. One other question along these lines. When the dredge was removed from Gravesend Bay about three thousand yards or feet?
A. About four thousand feet.
Q. About four thousand feet to Coney Island. You say a skeleton crew was kept aboard?
A. Yes.
Q. How many in a skeleton crew.
A. Well, usually eight in the skeleton crew. Eight to ten.
Q. Was there a cook kept aboard to provide meals for these men?
A. Those men, at that time they wanted—they didn't want to pay their dollar a day to the company, they thought

that the lunchroom was right nearby on the street and they preferred to go there and eat.

Q. Now explain to me about this dollar a day. The claimant tried to say something about it but I didn't get the full import of it?

A. Well, usually on account of the work, the dredge being out in the water at all times, it's inconvenient for the men to get back and forth and a lot of men live so far away the company finds it necessary to give the men a place to sleep aboard, clean rooms with water and everything they [fol. 81] want, and so forth, and the company usually hires a cook, pays the cook so much a month or a week or whatever it may be, with a helper. Then the company deducts one dollar a day from each and every member of the crew who are supposed to eat aboard the dredge.

Q. In other words the men pay for their meals?

A. Yes.

Q. And the company does not furnish the meals gratis, is that right?

A. Well, they furnish the meals.

Q. Well, if they charge them a dollar a day, the men are virtually paying for it?

A. That's part of their wages. Yes, I believe so. They don't give the food to them.

Q. And——

Discussion off the Record.

Q. Was the dredge "Miami" in operation prior to March of 1939?

A. During that year?

Q. During that year, yes.

A. She was at Bayonne terminal in New Jersey.

Q. Was it operated there, or tied up?

A. Operating there.

Q. How long had it been in Bayonne terminal?

A. That I couldn't say, I think about a year and a half prior to January of 1939.

Q. Now after——

Mr. Fridlund: If your honor will excuse me, we intend to cover the specific dates that you request through the testimony of Mr. — (indicating).

The Referee: Then I'll forego that with the witness.

[fol. 82] Q. Now, one of the reasons we adjourned the hearing to get expert testimony was to clarify the status of the various persons aboard the dredge. Now, Mr. Paulson told me that there are several men called levermen or operators, will you describe to me what work they do?

A. Why they call them operators and some call them levermen. They are men that work in eight hour shifts, three shifts, that is night and day. They stand in the lever room on the dredge and they start and stop the pump, that is the dredge, when it's necessary to and——

Q. When you say the pump, you mean the hydraulic pump?

A. Yes, they signal to the engineman and he in turn operates the engine that excavates the material over the dredge area and he then—of course it's just like you operate your automobile—he keeps it within the areaway of the excavation and—in other words he moderates it so it doesn't check its——

Q. Is there one leverman, three throughout the twenty-four hours?

A. Three for the twenty-four hours.

Q. That is one at a time for eight hour shifts?

A. That's right.

Q. Now, will you explain to me what the mates do aboard the dredge?

A. The mate's job aboard the dredge is to keep everything in shipshape condition and see that everything is kept in it- place, the ropes and cables and—et cetera and he usually handles the derrick barge. We have a small derrick barge that we—it's necessary to go out and shift the anchors and head so the dredge can maneuver, and to look after the deck hands to see that they do their work and keep it in shipshape condition and usually, sometimes, when they haven't much to do they wash it, paint and grease up [fol. 83] the dredge. There is a lot to do. But that is usually his job, the mate, now and he gives orders for the small boats when they want oil and fresh water.

Q. Mr. Paulson described some of the men aboard the dredge as sailors, which class does that cover?

A. We call them deckhands. It's a sailor's job all the way through.

Q. Well, as used in the maritime sense, are these men strictly sailors?

A. They're supposed to be sailors.

Q. What?

A. They're supposed to be sailors. You hire a man and ask him if he is a sailor, he says——

Q. Must he have an A. B. Certificate?

A. Not necessarily.

Q. Isn't this work of a laborer's variety?

A. More or less, it's a laborer's variety aboard the dredge.

Q. Well, what I want to know is the use of the term sailors as applied to the dredge. How does that compare to the use of the term sailor on the sea-going vessel?

A. I don't know just how long it is now before us. They're supposed to have A. B. Tickets, they're supposed to have a ticket.

Q. Is there this distinction, the sailors aid in the navigation of a vessel whereas on the dredge they work aboard in the category of common laborers. Is that a true distinction?

A. Well, laborers, common laborers couldn't do the work that is to be done, sometimes, in the dredge, so many cables——

Q. I'm talking now about the ordinary deckhand. Is their work any different from that of a common ordinary laborer's work?

A. I'd say yes.

Q. In what way?

A. I can't take a laborer and put him out and tie the [fol. 84] ship and splice cables and things like that. Oftentimes you might get a brilliant laborer that can work on a dredge that knows that kind of work.

Q. Does the man have to have previous dredging experience to get a job aboard the "Miami"?

A. Well, we don't usually do it that way, I mean, myself, if I have a good willing man and he hasn't worked aboard a dredge and he knew how to tie lines and swim, I'd take him to work.

Mr. Fridlund: Perhaps he can answer your question this way. If you have your choice in hiring deckhands between those who have and those who have not an A. B. Ticket do you take by preference those who do not have an A. B. Ticket?

Mr. Gee: I do, but they're usually hard to get. They don't follow dredge boats. They're seafaring men, want to

go to sea. Aftentimes we do get a married man that is tired of going to sea and he is glad to get it.

Q. But it isn't a prerequisite, to get an A. B.?

A. Not necessarily, no.

Q. Is it common in the dredging trade to call these deckhands sailors?

A. Well, sometimes captains call them sailors. He might say "Sailor, do this or that".

Q. How are they listed?

A. Usually deckhands. Deckhand or seaman.

Q. Are any licenses of any nature required for any of the jobs aboard the dredge, from the captain down?

A. No.

Q. Does that include the engineers?

A. That includes the engineers. In the city of New York he is supposed to be a licensed engineer.

[fol. 85] Q. Well, is there a license required for an engineer aboard this dredge?

A. In New York harbor, yes.

Q. And does that cover the engineer only or other persons?

A. The chief engineer in charge. He is responsible for the boilers.

Q. That is a local regulation?

A. That is a local, yes, building department.

Mr. Fridlund: When you say local, you, what do you mean?

Mr. Gee: Well, I would say the city of New York, the State of New York, which includes Brooklyn. When a man is—has boilers under his jurisdiction, he is supposed to be a licensed man.

Mr. Fridlund: Yes, but they're licensed by the local or federal?

Mr. Gee: City.

Q. That includes the local classification of engineers?

A. Yes.

Q. That has nothing to do with maritime employment?

A. That comes under the stationary license of the City of New York. It's not a propelled vessel.

Q. Would you say that this dredge "Miami" was adapted for navigation?

A. To go to sea, you mean?

Q. Any navigation on water.

A. On water, yes, but she is not built for being self-propelled vessel but she is adaptable to go to sea and be towed by another propelled vessel.

Q. That is what you mean when you say "navigation"?

A. No, I won't call that navigation. I would call that a seaworthy dredge.

[fol. 86] Q. Well, aside from its seaworthiness, would you say that the dredge "Miami" was adapted for navigation?

A. I wouldn't—I just don't know how to put that.

Q. Well, can it transport cargo?

A. Very little cargo.

Q. Isn't it a fact that the machinery of the dredge occupies most of the space?

A. Yes, that is true.

Q. And can it transport passengers, outside of a crew?

A. No.

Q. This particular job around Gravesend Bay——

A. Yes.

Q. —did it work have anything to do with the deepening and removing the obstructions from the channels or harbor?

A. Well, I wouldn't say that, from the—from the standpoint—my own idea is that she was working in navigable waters.

Q. Well, aside from that, nobody quarrels with the fact that Gravesend Bay is a navigable water and that the dredge was in the water. What I want to know is from this particular work that the dredge did in 1939, would you say that, as an expert dredge captain, that this work was in connection of the deepening of the channel or harbor?

A. It was to its advantage, yes.

Q. Wasn't that a secondary advantage?

A. Yes.

Q. Was the primary purpose, as Mr. Paulson testified, to remove matter from beneath the surface of the water and fill in land at Gravesend Bay?

A. That's correct.

Q. And wasn't that the primary purpose pursuant to the city contract?

A. That's correct.

Q. And would you say that the contract was for the purpose of removing obstructions from the channels or the waters in this particular harbor?

[fol. 87] A. Well, that all depends upon the channel. I didn't never go into it that deep to find out exactly just where the location of the channel lines were.

Q. Was the principal purpose of this dredging operation to remove obstructions from beneath the water?

A. Yes.

Q. What obstructions were there?

A. Shoal water, sand. That would make——

Q. Was the primary purpose to remove the obstruction or was the primary purpose to obtain fill?

A. That I couldn't say.

Q. What was the nature of the contract?

A. A fill.

Q. When you say a fill, you mean to obtain material to deposit on the land? To fill in the land?

A. That's correct.

Q. Wasn't it a fact, in this phrase that has been used by the Internal Revenue Department, employer's exhibit F, when it said that work consists of removing obstructions in channels, what is meant by that is to remove obstructions beneath the surface of the water which are a menace to navigation?

A. That's right. True.

Q. Isn't that what is commonly meant, if there is a rock or deposit of some kind and a dredge is engaged to remove that obstruction, as an aid to navigation?

A. That is true.

Q. In this case was this a land job rather than a maritime dredge?

A. Well——

Mr. Fridlund: If you please, isn't this a double question? I have to object to it.

The Referee: I withdraw the question if you press the objection.

Q. What I want to know from you, you have been brought here to give expert testimony, I want to know this, frankly [fol. 88] and openly, this is the proposition that confronts me. The Standard Dredging Corporation relies upon a letter of the Internal Revenue Department which says, I'll read it to you, "This office now holds that dredges which are intended and adapted for navigation and transportation by water of their crews, supplies, and machinery from point to point in carrying on the work of deepening and remov-

ing obstructions from channels and harbors in aid of navigation and commerce are vessels within the meaning of Section 811 and Section 907 of the Social Security Act." Now having relied on this language they claimed exemption in this particular tax case, I want to know from you as a dredge captain whether this particular dredge was intended and adapted for navigation and transportation by water of crews, supplies, and machinery?

A. She was built with that intention, yes.

Q. Well, were they operated along those lines in this particular job in 1939?

A. Yes.

Q. In what way?

A. Well, I would say for deepening the waterway to obtain fill.

Mr. Fridlund: May I suggest one thing, your honor?

The Referee: Yes, Mr. Fridlund?

Mr. Fridlund: That you will notice that the ruling on which reliance is made does not talk about what a vessel is doing at a particular time. It talks about the type of vessel and the design for which she was built. Now, I'll be very glad if you will bring that out and—or if you wish me to do it I will be very glad to bring it out.

[fol. 89] The Referee: Well, you don't seriously urge that if the vessel is built for one purpose and then used for another that the purpose for which it is built, rather than the use of it——

Mr. Fridlund: Yes, so long as this is a vessel of the United States and she is operated on the navigable waters of the United States then her master and crew are exempt from the Federal tax. Now it is the design of the vessel, the nature of her build which governs. It doesn't make any difference whether that vessel is being paid for making a fill or making an excavation. Necessarily every dredging operation has two parts, a picking up and a laying down. The usual situation is that we are usually paid by the federal government for picking up and sometimes have to pay for dumping. In this particular case it happened that we could get the fill in the excavation area free of charge. The government liked to have it deepened—the federal government—and we were paid for making the fill on the land side, but the operations are identical.

The Referee: Well, in a workmen's compensation case the Supreme Court of the United States has held that where the work of a barge hand, for instance——

Mr. Fridlund: Yes.

The Referee: —was not in aid of navigation, that it was not that kind of maritime employment which was included in the term "crew",——

Mr. Fridlund: Well——

[fol. 90] The Referee: —and that is the only purport at that time of my questioning these witnesses, to determine whether this particular work was in aid of navigation. Now, you're relying upon the physical characteristics of the vessel to cover the intents and purposes of this job,——

Mr. Fridlund: Yes.

The Referee: —whereas I feel that I ought to know whether the work done by the persons aboard this dredge was in aid of navigation.

Mr. Fridlund: Well, may I suggest that that is entirely too narrow a scope of question?

The Referee: Well, I'm not limiting the entire case to that. That is one of the phases that I'm interrogating.

Q. Mr. Gee, I want to know whether on this dredging operation, on sucking out sand from beneath the water of Gravesend Bay and depositing it on the roadway to make a new highway, whether you can argue or claim that this work was in aid of navigation, and—that is what I want to know?

Mr. Fridlund: Well, may I direct a few questions with the intent of bringing out that?

The Referee: I'll be glad to have you do so.

By Mr. Fridlund:

Q. Mr. Gee, can you tell us the way this vessel was designed? To do what kind of work?

A. The dredge "Miami" was designed to excavate mate-[fol. 91] rial under the surfaces of water—and obstructions —and for deepening harbors or deepening channels for navigation, or any other obstruction that may be in the channels or navigable waters.

Q. She was designed——

A. Purposely for excavating all or any kind of material, with the exception of rock, under the water. That is the purpose of her being a hydraulic dredge.

Q. In other words, to remove obstructions to navigation?
A. To navigation, correct.

Q. And to deepen harbors?
A. Or channels or harbors.

Q. Is the nature of the work of the vessel in any ways changed by which end of operation the company happens to be paid for? Whether it pays for picking up the material or laying it down?

A. That doesn't change the operation.

Q. The physical operations are the same?
A. At all times.

Q. Does the dredge "Miami" carry aboard, when she is moved from place to place, any supplies or materials?
A. Well, no, no large materials. It is impossible, but such as wood skiffs, or anything like that.

The Referee: Wood what?

Mr. Gee: Wood boats, or anything like that. Those spuds are taken out from the material and one laid on each side and they are fastened securely to the deck, but pontoons and pipelines, that's usually put in other vessels to be transported.

Mr. Fridlund: Does that cover in general the area you had in mind?

The Referee: Let me ask this question.

[fol. 92] By the Referee:

Q. When you answered Mr. Fridlund that this dredge "Miami" was intended for these purposes that you testified to,——

A. Yes.

Q. —isn't the dredge usable also as a hydraulic dredge for commercial purposes. That is to suck sand from beneath the surface of the water or from a sand bank and convey it on to the lands to be used for commercial purposes?
A. Yes. Not for filling.

Discussion off the Record.

A. Well, that I don't know. I wouldn't swear to it.

The Referee: All right, Mr. Rosen.

By Mr. Rosen:

Q. Mr. Gee, I show you employer's exhibit D which is a sketch of the proposed dredging of Gravesend Bay and ask you to mark with a pencil the area of excavation on that sketch.

By the Referee: Indicating the reverse side of employer's exhibit D.

Discussion off the Record.

The Referee: Well, is the shaded area, the area of excavation?

Mr. Fridlund: It is the entire area of excavation.

Discussion off the Record.

[fol. 93] The Referee: Reframe your question. This photostatic material is part of employer's exhibit E and in order to make sure there's no confusion about it we will mark it employer's exhibit E(1). All right, continue Mr. Rosen.

Mr. Rosen: Mr. Fridlund perhaps you can answer this question. Is this shaded area which has the words Gravesend Bay running through it the area of excavation?

By the Referee: As shown on employer's exhibit E(1).

Mr. Fridlund: That is correct. It is marked on the plan here of the army engineer's dredging area and represents the area within which it permits the excavation.

Mr. Rosen: And this red area which is above the word "bulk line". Is that the area where the sand was being deposited?

Mr. Fridlund: That is correct. It is planned as——

Mr. Gee: May I call your attention to the fact that all of that was water area and extended in depth to two point four feet for thirteen feet.

Mr. Rosen: One more question. In the upper right hand corner of this photograph, employer's exhibit E(1), there is a sketch with a cross in red, does that indicate the dredging area?

Mr. Fridlund: It does.

Q. Mr. Gee, at the time these operations were being done [fol. 94] or made by the dredge "Miami" was there a contract for the same work between this employer and anybody else excepting the City of New York for that work?

A. That I don't know. That is official business and I don't—I'm not acquainted with it.

Mr. Fridlund: Mr. Paulson, I think, can answer that question.

Mr. Rosen: I have no further questions.

The Referee: One further question, Mr. Gee.

By the Referee:

Q. Coming back to the dollar a day charge that is to cover the three meals per day furnished by the Standard Dredging Company for the worker aboard the dredge?

A. Yes, sir. Of course that included their room, board and their clean linens and so forth.

Q. Was the dollar a day intended to cover lodging also.

A. Dollar a day is the board. What they call board, I don't know whether——

Q. Well, we distinguish between board and lodging. Board meaning food and lodging sleep.

A. That's correct.

Q. Do you know whether the dollar a day was to cover both?

A. Yes, both.

Mr. Fridlund: I intend to cover that in the testimony of Mr. Pippitt.

The Referee: All right.

Q. And is it correct, as you indicated before, that this provision is made for convenience sake, to——

A. Keep our men intact.

[fol. 95] Q. So that they don't go——

A. Astray.

Q. —home and have difficulty getting back to the dredge out in the harbor. Is that right?

A. That's correct, yes sir.

The Referee: Anything else with Mr. Gee?

Mr. Fridlund: No.

Ray Pippitt, witness, having first been duly sworn, testified as follows:

By the Referee:

Q. What is your connection with the Standard Dredging Corporation?

A. I'm employed in the main office as clerk.

Q. How long have you been so employed?
A. Since Spring of 1937.

The Referee: All right, Mr. Fridlund.

By Mr. Fridlund:

Q. I show you a sketch—a schedule marked "Mike Cassaretakis" and purporting to be a transcript of compilation of a payroll record beginning April 4, 1939 to August 17 for—purporting to be a transcript of the payroll record beginning February 4, 1939 and ending August 17, 1939. Will you tell me whether you prepared that schedule?
A. I made up a pencil transcript from the original payrolls, had it typed by a stenographer and then I checked it with my original records——
[fol. 96] Q. And that record is correct according to your original records?
A. I found that to be correct.

Mr. Fridlund: I'd like to have this marked in evidence.
The Referee: All right, there will be no objection I'm sure. Transcript of payroll is marked in evidence as employer's exhibit H.

Q. Well, now Mr. Pippitt, referring, if necessary, to the schedule which is exhibit H to refresh your recollection, if necessary, will you tell me whether during the entire period, from February 4, 1939 to August 17, 1939, the complainant was employed by employer in this proceeding. That is the New York corporation?
A. Not during the entire period. At first he was employed by the New Jersey corporation.
Q. During what period?
A. From February fourth to the middle of March, March fourteenth was the last day he worked in the New Jersey corporation.
Q. I see.
A. And then from March fifteenth——
Q. Well, now, will you tell me there, where was he hired by the New Jersey corporation?
A. That was while the dredge was still in New Jersey, at or near Bayonne terminal.
Q. And does any report of this period cover work on the Bayonne job?

A. I'm not positive as to that because there was also another contract which was worked at the same time with the federal government. The Bayonne job was with the City of Bayonne.

Q. Well, it doesn't make any difference.

A. But the fill was used for the Bayonne terminal.

[fol. 97] Q. Now, when did his employment, by the New York Corporation, begin?

A. The first day was March fifteenth.

Q. March fifteenth? What year?

A. 1939.

Q. '39. And the amounts earned and net paid and check numbers shown on this schedule are the correct amounts of wages paid and the payments earned by the complainant during the period from March tenth through August seventeenth that he was hired by the complainant in this action?

A. I found them to be correct acccording to the original payroll.

Q. Now, in what capacity was he hired and entered on your payroll records?

A. At first as a cook's helper, and then for most or all of the time the Gravesend Bay job was in progress, he worked twice a week as night cook and the rest of the time as cook's helper and then at the end of the period after he had been laid off as cook's helper——

Q. When was he laid off? As cook's helper?

A. On July ninth, then he was rehired on July twenty-first as a watchman, while the dredge was tied up at Coney Island.

Q. How long did that employment last?

A. He was there as a watchman until August fifteenth.

Q. Now, does the employer, here, keep separate records for the dredge crews and the shore gangs?

A. Yes, they are made up on separate payrolls and kept distinct because some of them are subject to certain things the others are not so they're always kept separate.

Q. Now as to the shore gang, which I believe Mr. Gee testified, generally went between fifty and a hundred men. Was New York Unemployment Insurance reported and paid by the employer?

A. I believe it was.

[fol. 98] Q. You don't know that of your own knowledge?

A. No, I don't recall.

Q. The employment by the New York corporation coincided with the Gravesend Bay job?

A. That's right.

Q. And ended when the vessel was removed from Coney Island—and was removed from Coney Island, is that correct?

A. Well, I'm not sure whether the dredge was removed from there at that time or not.

Q. Well, at or before the removal?

A. Yes.

Q. —of the dredge from Coney Island??

A. Yes.

Q. Well, as to the charges made for so called deductions at the uniform rate, apparently, of six dollars per week, will you tell me the nature of that deduction?

A. Well, that is made at the rate of one dollar per day. You will notice that some places (indicating) two, three, five dollars, depending upon the number of days he worked during that period.

Q. I see. In other words is it correct that his board at first—does this term board include board and lodging?

A. Yes.

Q. And was that board and lodging then given as a part of his pay?

A. No, he was rated at so many dollars per week, that was deducted from it. He was paid the difference.

Mr. Fridlund: I think that is all the questions I have.

Mr. Rosen: No questions.

By the Referee:

Q. In other words, Mr. Pippitt, these men were charged for board and lodging?

A. That's right.

[fol. 99] Q. And the company reimbursed itself to the extent of six dollars a week out of the wages of these men?

A. That's right.

Q. Did the company make social security returns on the dredge men?

A. Not on the dredge men.

Q. Have they made returns since January 1, 1940, since the social security act was amended?

A. Since then, yes.

Q. Now, since then as a matter of information how do you treat this item. Do you report on the net amount or the gross amount?

A. On the gross amount. For instance, the man in this case who earned $28.33 we pay a tax on that amount.

Q. Why do you do that, if you're charging for it?

A. Well, that is the amount he earned. The six dollars is the amount he sent back to us which wouldn't affect his earnings. He would still be earning $28 a week as we are charging him twenty-five cents a day——

Mr. Fridlund: Perhaps I can straighten that out with one or two more questions. Isn't it true, Mr. Pippitt, that the net result is that he is given in cash wages the amount shown under the paid column plus room and board valued at six dollars making his actual pay the amount shown in the column "Earned"?

Mr. Pippitt: That's right.

Q. So that you regard his earnings as the total amount which includes both cash and the value of board and lodging, is that right?

A. That's right.

Q. Have you a record of the duration of this dredging [fol. 100] operation job that "Miami" was engaged in, in 1939?

A. Yes.

Q. When did it commence operating and when did it cease operations?

A. It started digging on March 15, 1939—the last day on which it worked was July seventh.

Q. What happened after July seventh regarding this dredge "Miami"?

A. On that date the dredge was moved to Coney Island and tied up.

Q. And how long was it tied up with a skeleton crew at Coney Island?

A. I don't find any record of that here.

Discussion off the Record.

A. I find the payroll up to and including August thirty-first is marked Coney Island, and beginning September first is marked Clinton Street.

Q. Was it tied up at Clinton Street for any length of time?

A. A month.

Q. And did it have a skeleton crew aboard then?

A. There were a few men working there. I'm not sure.

Q. What do you mean by a few?

A. The chief engineer was there acting as a watchman and two or three other men that I saw on one of my visits there.

Q. And what happened after Clinton street. Where did it go?

A. Then it went to Florida.

Q. When did it start for Florida?

A. They entered the river at Jacksonville on November eighth.

Q. How long did the trip take?

A. About ten days.

Q. So that it left New York about the end of October, is that it?

A. Yes, from the middle to the end.

[fol. 101] Q. Now, there was some testimony before me last time, I think, Mr. Paulson said that this dredging operation in Gravesend Bay lasted about eight months, is that correct?

A. I believe I have given the dates of operation just a moment ago.

Q. Well, are your dates more specific than his statement of eight months?

Discussion off the Record.

Q. All right, explain that on the record.

A. What I just said——

Q. Yes?

A. For a while before the dredge started operating there was a shore crew working on the Gravesend Bay and for some weeks after the dredge had finished.

Q. All right.

The Referee: Now, Mr. Fridlund, I'd like to get a statement from you so that we don't go off into any by-paths of controversy and divert ourselves from the main issue. I want to settle with you the position that the Standard Dredging Corporation takes with regard to this man's earnings. Do you claim that his earnings are the gross amount or the net amount?

Mr. Fridlund: The gross amount. That has already been testified to. He was paid the amount shown in the pink

column in cash. The amount shown in the board column as board and lodging and the total amount of his earnings were in the column marked amount earned.

The Referee: So that this sum of six dollars was an [fol. 102] arbitrary sum charged to the men for the reasonable value of board and lodging, is that it?

Mr. Fridlund: As the measurement of the value of the board and lodging the company is required, for various reasons, to show total value paid and that naturally will include, as it does where New York Unemployment Insurance is applicable, the value, the fair value of board and lodging.

The Referee: Well, under the commissioner's regulations board is fixed at twenty-five cents a meal. That is the reasonable value thereof, and lodging is fixed at two and a half dollars a week.

Mr. Fridlund: Yes, I am familiar with that ruling, but that is a guide.

The Referee: Well, the regulations of the commissioner are as follows:

"In valuing said items of remunerations where a money value for board and lodging or both furnished a worker is agreed upon in a contract of hire, the amounts so agreed upon shall, if more than the rates prescribed herein, be determined the money value of such board and lodging until and unless a different rate for board and lodging is determined by the commissioner. Board and lodging furnished shall be deemed to have not less than the following values: Board, three meals per day, seventy-five cents; less than three meals per day, twenty-five cents per meal; Lodging $2.50 per week or forty cents per day."

See, there are limitations there. You can agree on more but the minimum is fixed by the commission.

[fol. 103] Mr. Fridlund: Well, the—where the actual charge by the company to the employee is a stipulated figure, I doubt whether that regulation comes into play.

The Referee: Well, it's quite clear, the language of it. The difference is one dollar and seventy-five cents a week so far as this particular case is concerned. Does this item of six dollars include seven days a week?

Mr. Fridlund: I don't know.

The Referee: I'll get that from the claimant. Perhaps Mr. Pippitt can answer that.

Q. How many days work a week did this man put in?

A. Six.

Q. Did he sleep aboard the seventh night and get meals the seventh day?

A. I don't know.

Q. All right, we'll inquire about that further. One other point I'd like to make clear. When you say on this employer's exhibit H that the first term of this man's employment is with the New Jersey corporation and the latter part with the New York Corporation, explain that?

A. What I refer to as the New Jersey corporation is the Standard Dredging Corporation and was incorporated in New Jersey and as the parent corporation. What I refer to as the New York Corporation is also known as the Standard Dredging Corporation and is incorporated in the State of New York and the subsidiary of the New Jersey corporation.

Q. Who had the contract to do the dredging work in Gravesend Bay?

A. The New York corporation.

Q. Was that under a charter arrangement with the New Jersey corporation?

A. I don't know that.

[fol. 104] Q. Why do you claim that he worked for the New Jersey corporation from February fourth to March fifteenth? He was on the same dredge "Miami"?

A. On a different contract. The New York Corporation.

Q. Who had the different contract?

A. The New Jersey corporation had it—the contract for the work in Jersey. When the New York corporation started operating, it rented this dredge from the New Jersey corporation. Paid a rental for it.

The Referee: Any other questions?

By Mr. Rosen:

Q. Mr. Pippitt, when did this dredge first come into the waters of Gravesend Bay?

A. Around March 15, 1939.

Q. On what date?

A. The daily report here says they moved on March 15 from Atlantic Basin to Gravesend Bay.

Q. Where is Atlantic Basin?

A. That is over here, around Red Hook somewheres.

The Referee: Brooklyn, that's enough.

Q. Now, will your records show where this dredge was at the beginning of March 1939?

A. There's no record on that because it wasn't operating at the time.

Q. Where was it, will your records show when this barge was rented by the New York Corporation from the New Jersey corporation?

A. Yes.

Q. When?

A. On March 15, was the first day.

[fol. 105] Q. And at that time the barge was in New York waters?

A. Yes.

Q. When did it come into New York waters after it finished that job in New Jersey?

A. A week or two before, I have no exact date.

Q. Well, could we say that it came into New York water around the first of March 1939?

A. It was sometime after February 22, sometime before March 15.

Mr. Rosen: We agree on a date there.

Mr. Fridlund: Yes, I intended to bring that out in the testimony of Mr. Paulson. He knows those dates.

Q. Mr. Pippitt, what office do you work?

A. Main office.

Q. Where is that?

A. 85 Broadway.

Q. You work with a New York Corporation?

A. And I work with a New Jersey corporation and that being the parent organization also do work for the subsidiary.

Q. These payroll records are records kept by the New York corporation, is that correct?

A. These are both parts of the New Jersey and parts of the New York.

Q. I see.

Mr. Rosen: All right, that's all.

Discussion off the Record.

Mr. Fridlund: The dredge "Miami" was operated at Bayonne, New Jersey, by its owners the parent corporation Standard Dredging Corporation until February 23.

[fol. 106] The Referee: That is 1939?

Mr. Fridlund: 1939, and from February 3 to February——

The Referee: Twenty-third.

Mr. Fridlund: Twenty-third. The claimant was employed, according to what is there, employed, according to the payroll records, exhibit H——

The Referee: Well, no. Your exhibit H says he was employed the first day by the New York corporation on March 15?

Mr. Fridlund: I'm talking about the New Jersey corporation at the Bayonne job.

The Referee: Well, then I misunderstood you. You just said according to my understanding that the first day——

Mr. Fridlund: No.

The Referee: Well, straighten yourself out, or straighten me out.

Mr. Fridlund: Let me straighten you out. The dredge "Miami" was operated at Bayonne, New Jersey, on the job there by its owner the Standard Dredging Corporation, a New Jersey corporation——

The Referee: Yes?

Mr. Fridlund: —until February 23, 1939. During the last twenty days of that period, namely, February third to February twenty-third, inclusive, the—the claimant was the—employed on the dredge at Bayonne by the New Jersey corporation.

The Referee: I see.

Mr. Fridlund: And his employment was continued by the [fol. 107] New York corporation after the dredge "Miami" finished the Bayonne job, from February twenty-third until March fourteenth when the Gravesend job began, by the New York corporation. At that time he was employed by the New York corporation.

The Referee: Well, what happened between February twenty-third and—1939—and March 14, 1939? Where was the man working then?

Mr. Fridlund: Does your records show that, Mr. Pippitt?

Mr. Pippitt: That was the time while the dredge was at Atlantic Basin.

Mr. Fridlund: Let's get that straight. She was at Atlantic Basin, in Brooklyn, during what time, what period.

Mr. Pippitt: From February twenty-third to—until March fifteenth.

The Referee: Now, what I want to make clear now is who was the employer between March—February 23, 1939 and March 14, 1939?

Mr. Pippitt: That was the New Jersey corporation.

The Referee: While he was at the Atlantic Basin?

Mr. Pippitt: Yes.

The Referee: I see. All right. And then he was transferred to the New York payroll on March 15, 1939, and continued until August seventeenth, is that right?

Mr. Pippitt: That's right.

The Referee: All right. Now I got that clear.

[fol. 108] Mr. Fridlund: For what purpose was the dredge at the Atlantic Basin?

Mr. Pippitt: For repairs.

Mr. Fridlund: Testimony was given last time, I believe, to the effect that she was in drydock, is that correct?

Mr. Pippitt: Not to my knowledge.

The Referee: That doesn't make any difference, I'm only interested in the situs. Any other questions for Mr. Pippitt? Have you any other witnesses Mr.—are you going to ask Mr. Paulson?

Mr. Fridlund: I think the questions that we were going to be covered with Mr. Paulson, have already been covered.

Mr. Rosen: Just one angle I want to get on this record. During the life of the work on the contract between the New York corporation and the City of New York was this corporation doing work under any other contract covering the same territory?

Mr. Fridlund: Contract with any other party?

Mr. Rosen: Yes.

Mr. Fridlund: Not so far as I know.

Mr. Paulson: Yes, by the Belt Roadway. Down further we had another dredge down there.

Mr. Pippitt: Dredge "Allendale Paulson".

Mr. Paulson: Digging out material for the government.

Mr. Rosen: What government?

Mr. Paulson: During the same period. What was the name of that outfit—Henry Stears had a contract with the [fol. 109] City of New York to make another fill further down below the—below the other side of Hamilton Parkway and in that contract, while we got a sub-contract to put in a fill and also the government came along and advertised a dredging job out in Red Hook Flats with the idea of putting that material in this fill and we had the—we took the

contract for the government—with the government to put that material on the fill and also took the contract with the subcontract with Stears to put the stuff in the fill.

Mr. Rosen: Was the dredge "Miami" engaged in that work?

Mr. Fridlund: What was your question?

Mr. Rosen: I wanted to limit it to "Miami" only.

Mr. Fridlund: I thought you said the work?

Mr. Rosen: No, no, the dredge "Miami", it was working pursuant to the contract with the City of New York.

The Referee: All right.

Claimant Recalled

By the Referee:

Q. How many days a week did you work?

A. Six days a week.

Q. And how many nights did you sleep aboard the dredge?

A. Oh, most of the time. I sleep there because I—if I didn't sleep there I can't take care of the people in the morning.

[fol. 110] Q. You claim that you slept there seven nights a week?

A. Sometimes.

Q. Well, was it more often than not?

A. Well, to the beginning I go once a week home, but then I stay steadily. In summertime I almost go out most time.

Q. And on your day off, did you get three meals a day too?

A. No, of course not.

Q. Are you willing to accept this figure of six dollars as representing the value of the board and lodging you got per week?

A. What do you mean?

Q. Well, if you got three meals a day——

A. Yes.

Q. —and a night's lodging, you're entitled to a credit of one dollar and fifteen cents a day—by the day, or if you were there throughout all week, you got that for seven days a week. It would come to seven dollars and seventy-five cents on the basis of two dollars and fifty cents a week for lodging and seventy-five cents a day for meals. Now, is six

dollars to your mind a fair and reasonable value of what you got for board and lodging on this job?

A. I don't know. The company knows that. We only know one thing, they tax us a dollar a day for everything and the kitchen people pay a dollar a day.

Q. In other words they gave you so many dollars in cash and then they gave you board and lodging which they said was worth a dollar a day for six days a week. Are you willing to accept those figures at the rate of one dollar a day for the six days a week?

A. They charge what I say, yes.

Q. Is that satisfactory to you?

A. What I'm going to do? I can't declare war with the company.

[fol. 111] Q. Well, no, you don't have to take—if you don't want to—What I want to know is from what you got including the day off?

A. Yes, sir.

Q. Is a dollar a day fair and reasonable value for what you received in board and lodging from this company, or six dollars a day, make it by the week. What do you say?

A. Any way the court makes I'm not satisfied.

Q. I wasn't there, I don't know how many meals you got.

A. Three meals.

Q. On your day off you didn't have any meals?

A. No.

Q. That is eighteen meals a week. That is four and a half dollars a week, according to what the commissioner figures it. Now, if you were there six nights a week, it would come to two dollars and forty cents or six dollars—a total of six dollars and ninety cents. Are you going to argue about his ninety cents or his six dollars a reasonable value of what you got?

A. I wouldn't argue, I'm satisfied.

Q. You understand what I'm saying?

A. Everybody satisfied? I'm satisfied.

Q. You're satisfied to accept the figure of six dollars?

A. If it's all right to you, it's all right to me.

Q. Its immaterial to me. I'll give you everything you earned. What I want to know is, sometimes you stayed aboard and sometimes you went home and that you didn't eat there on your day off?

A. No.

Q. What I want to know is according to what you actually got weekly——

A. Yes.

Q. —would six dollars fairly represent the value—if we consider twenty-five cents a meal as a reasonable figure [fol. 112] and forty cents a night for a reasonable figure for lodging——

A. Yes.

Q. —would six dollars cover those two items? Would it?

A. All right, I think that is too much.

Q. Too much?

A. Yes.

Q. Then we'll give you six dollars. Will you be satisfied?

A. No, six dollars not satisfied.

Q. Well, if your pay is increased by six dollars a week——

A. Yes.

Q. —so much cash, plus six dollars a week, is that agreeable to you to show what you got out of this job for your labor?

A. That's right.

Q. You understand it now?

A. Yes.

Q. Is it clear?

A. Yes.

Q. We are not taking from you, we are adding it to you?

A. Yes.

Q. Now, tell me this, when you first got this job, did you work at Bayonne?

A. Statue of Liberty. Statute of Liberty is there and I'm here. It's downtown New York. Don't call that Bayonne.

Q. Was that on a job?

A. Of course it's on a job. They pump from there to Bayonne.

Q. They pump to Bayonne?

A. Yes.

Q. To the New Jersey shore?

A. Yes.

Q. Do you know what water that was in?

A. I don't know.

Q. And how long did this work last at the Statue of Liberty?

A. Only a few weeks I remember.

Q. And did you start around February Fourth?

A. Yes, sir.

Q. And then is it a fact from that, the day of Washington's birthday to the middle of March——

A. Yes.

[fol. 113] Q. —you were in Brooklyn?

A. After the twenty-third of February, like they say, we went to the drydock.

Q. That is what I said. Is that true?

A. Yes.

Q. And after March fifteenth you began on the Gravesend Bay job in Brooklyn?

A. Yes.

Q. So the dates that Mr. Pippitt gave us are correct?

A. I was in drydock all the time. Only two people, me and the steward.

Q. Now, they say that while you were working on the Bayonne job and while you were in drydock you were working for the New Jersey corporation?

A. I don't know how they figure.

Q. That is inside——

A. I only know the office in New York and the—they hired me from New York.

Mr. Fridlund: I think if he sees the checks he'll understand.

Q. Were you paid by check?

A. Yes, all the time by check. Never cash. I cash my own checks in the same place.

Q. Now, look these checks which have been handed to me by counsel show that from February tenth to March tenth, inclusive, being the dates of checks, you got paid by check drawn on a Bayonne bank called the Hudson County National Bank by Robert A. Craig. Is that correct? Look at these checks and see if they are yours. With your signature on them.

A. That is mine.

Q. What?

A. That is all mine.

Q. Are all those checks yours and with your endorsement?

A. Yes.

Q. And you notice they are drawn on a New Jersey Bank?
A. Well, it's the nearest bank.

[fol. 114] The Referee: All right, series of five checks marked in evidence as employer's exhibit I.

Mr. Fridlund: I'd rather not put them in evidence.

The Referee: I'll give them back to you. Why don't you want to put it in the record?

Mr. Fridlund: It just encumbers the record, you can stipulate.

The Referee: I can't get him to stipulate. I don't know the facts nor does Mr. Rosen.

Q. Now, these other checks which have been handed to me are drawn by the Standard Dredging Corporation, a New York corporation, on the National City Bank of New York, Brooklyn branch, signed by Robert A. Craig, paymaster. Are those your checks? Look at them please.

The Referee: And while the claimant is looking at the checks, will you Mr. Fridlund, identify Robert A. Craig whose name is signed to the checks which comprise employer's exhibit I.

Mr. Fridlund: Well,——

The Referee: I'll take your statement in lieu of testimony.

Mr. Cassaretakis: Mr. Pippitt, he is the paymaster at Bayonne.

The Referee: If you don't know, I'll suspend for a moment and call Mr. Pippitt.

[fol. 115] Mr. Pippitt Recalled

By the Referee:

Q. Mr. Pippitt, who is Robert A. Craig?
A. He is the paymaster at Bayonne terminal.
Q. And why are those checks drawn on his personal account?
A. As a matter of convenience, I presume. I don't know.
Q. Are those checks out of the funds of the Standard Dredging Corporation of New Jersey?
A. Oh, yes.
Q. Were they allocated to that corporation on your books and records?
A. Yes.

Q. Now, if he was stationed in Bayonne why is his name on the other checks of the Standard Dredging Corporation of New York? The others that the claimant is looking at.

A. After the job at Bayonne was finished Craig went over to Brooklyn and was, for a while, in charge there at Atlantic Basin and Red Hook.

Q. What I want to know is, these Bayonne checks, which are employer's exhibit I, are they out of funds of the New Jersey corporation or the New York corporation?

A. The New Jersey corporation.

Q. Are you definitely sure about that?

A. Definitely.

Claimant Recalled

By the Referee:

Q. What do you say now?

A. These are my checks.

[fol. 116] Q. All your checks, is that right?

A. Yes, sir. And a couple of more missing here. I know the steward, I give the steward to cash it sometime. A couple missing.

The Referee: Checks of the Standard Dredging Corporation, a New York corporation, to the claimant's order, drawn on the National City Bank of New York, between the dates of March 17, 1939, and August 12, 1939, are marked in evidence as one exhibit as employer's exhibit J. I think that is established now.

Q. Did you have anything to do with Mr. Sackett, the superintendent?

A. Well, he was the boss around there.

Q. Did he boss you?

A. Oh, yes, he could tell the steward to fire me. Mr. Sackett dont' bother everybody else. He wanted to fire somebody he say the steward, "Fire that man." But he say to this man, "Fire this man."

Q. Did he have anything to say over you?

A. No.

Q. How often was he on the dredge?

A. Every day he come around, every day.

Q. What did you see him do?

A. Look around and that is all.

Q. All right, anything else you want to tell me in this case?

A. Well, that is all. What else I got to say?

[fol. 117] Mr. Paulson recalled.

By the Referee:

Q. Can you tell me in what waters the first job, on which this claimant worked on the dredge "Miami", was performed?

A. Well, I believe under the waters of New Jersey, but I'm not exactly sure.

Q. Do you know where the dredge was located during those operations?

A. Yes.

Q. Will you describe to the best of your ability where, physically, it was located?

A. It was right to the south of the Statue of Liberty, south of the Statue of Liberty, three or four thousand feet.

Q. And to what shore was the pipe line attached?

A. The pipe line was attached to the fill, Bayonne fill, out in the main——

Q. Have you any records here which would indicate with exactitude the location of the dredge on that operation?

A. No, we have no records here.

Q. Well, I don't want to testify in this case, but I had another dredge case which also had an operation on the Statute of Liberty and Bedloe's Island.

A. I'm pretty sure this dredge was in the lines of New Jersey, because——

Q. As I was saying, this other case's dredging operations were southwest of Bedloe's Island nad government maps were brought in and I recollect that the state lines, as between New York and New Jersey, came between it, that is included this operation in New Jersey section of those lines. But of course that is not evidence in this case, it's just my recollection.

[fol. 118] Mr. Fridlund: If you wish, I can take the stand in that regard because I looked into that subject matter at the time when Mayor Hague was very busy assessing his personel property taxes in Jersey City and in looking into the matter in that time I satisfied myself that, one—that the dredge was within the state waters of New Jersey and,

two—that it was outside of the jurisdiction of Jersey City and in the city of Bayonne.

The Referee: Well, in this case it's fairly academic, because even without these New Jersey earnings, as you term them, if I should find that the claimant worked in covered employment he would have earnings of $574.74 which would be adequate to give him benefits. Whether they would give him maximum benefits or not I would have to figure out.

Discussion off the Record.

By the Referee: According to my calculations if this claimant is entitled to benefits his earnings in the base year would bring him within the eleven dollar class under section 505 of the Law. Now, if the earnings in the first part of his employment were included, you get a higher rate.

All right, do you want to recall Mr. Pippitt?

Mr. Pippitt Recalled.

[fol. 119] By Mr. Fridlund:

Q. Has the New Jersey corporation an office in New York.

A. Yes.

Q. Where is that office?

A. 80 Broad Street.

Q. And in 1939 did it have an office in New York?

A. Yes.

Q. How many employees did the New Jersey corporation have in its New York office during 1939?

A. I'm not sure of the exact number. Somewhere between twelve and twenty.

Q. Permanent employees?

A. Yes.

Q. Do you know whether the New Jersey corporation filed an initial statement—made returns and paid contributions—unemployment insurance contributions to the state of New York on its New Jersey—on its employees at 80 Broad Street?

A. I don't know.

Mr. Fridlund: May I correct some of those statements? I'm afraid Mr. Pippitt is not familiar with the situation. I'd like to call Mr. Paulson.

Mr. Paulson: My son has charge of the tax matters.

Mr. Fridlund: Could you answer those questions, Mr. Paulson?

(To the referee) Mr. Paulson is an officer of the company.

(To Mr. Paulson) Mr. Paulson will you tell us the situation with regard to the officers of the New Jersey end of your corporation. Its operations with particular reference to its operations in New York?

[fol. 120] Mr. Paulson: All I know, the New York officials pay taxes to New York, all the employees of the New York office, including myself as an official and the other officials, we pay compensation to the State of New York and personally file reports. Mr. Gee's salary is in New York, he is out at Jamaica Bay. We have a terminal there.

Mr Fridlund: Mr. Paulson, will you answer this question? Does the Standard Dredging Corporation of New Jersey maintain a New York office?

Mr. Paulson: We maintain several offices. We're a large corporation. We have a large office in New Orleans, Galveston——

Mr. Fridlund: In New York?

Mr. Paulson: They have an office in New York where they do certain work.

Mr. Fridlund: Is the New Jersey corporation a subject employer within the meaning of the New York State Unemployment Insurance Law and does it pay contributions to the New York State Unemployment Insurance Fund?

Mr. Paulson: Yes, for the employees they have with the New York State Insurance Law.

Mr. Rosen: Then, Mr. Referee, it would be proper to take into consideration here that periods of time that this dredge "Miami" was laid up at the Clinton Street drydock, as this employee, according to the record, at that time was an employee of the Standard Dredging Corporation of New Jersey and all or the greater part of his services with that corporation were within the State of New York——

[fol. 121] Mr. Fridlund: May I correct—suggest a correction on that? The greater part—the claimant was hired by the New Jersey company in New Jersey for work there and the greater part, to wit, approximately sixty-odd per cent in time and amount was in the State of New Jersey.

Mr. Rosen: Well, according to the record he was hired February third.

Mr. Fridlund: That's right.

Mr. Rosen: The boat went to drydock February twenty-third, it stayed in drydock until March fourteenth, so surely the greater part of his time spent was in the State of New York.

The Referee: Well, there is this question about that. Now, let's not get into too many ramifications about that because the Law was different prior to June 3, 1939. Prior to that date the Law provided that all or the greater proportion of the work had to be performed within the State of New York to render it subject. After June 3 there were various changes and insofar as this particular claimant would be concerned there were—if he showed that he performed some services within the State of New York and the base of operations was in the State of New York then he would be in covered employment.

Mr. Fridlund: Yes.

The Referee: Or if he showed that the work was localized within the State of New York, that is that the main work was done within the confines of the State of New York. Whatever was done outside of the State was incidental to [fol. 122] the work within. The work then would be subject employment. But either way, it seems to me, the employment here is New York employment because I'm going to distinguish between the work done for the New Jersey corporation and the work done for the New York corporation and, parenthetically, I have rechecked my figures, I find that the claimant, if eligible, that is if he worked in covered employment would be entitled to maximum benefits under our Law and, therefore, we can safety exclude the New Jersey corporation in his calculation because his New York earnings are $574.10 bringing him well within the maximum benefits of $15.00 a week for thirteen weeks.

Mr. Rosen: I'm interested in the other angle however, for tax purposes, Mr. Referee.

The Referee: Well, this is a claimant's case Mr. Rosen, and I cannot go into the general tax angle in this case. I'm only confronted with the problem of whether this claimant worked in employment subject to the Unemployment Insurance Law and, if so, what his earnings were and I think we had better leave it at that point, Mr. Rosen, and surely his work within the New York Corporation was wholly performed within the State of New York, both prior to June third and subsequent to June third, so that becomes of no

moment in this particular phase of questioning. Is there any other testimony to be offered?

Mr. Rosen: I'd like to ask Mr. Paulson——

[fol. 123] Mr. Paulson Recalled

By Mr. Rosen:

Q. Mr. Paulson, there is no question, is there but that the work performed by the "Miami" at Gravesend Bay was performed under the supervision and control of the New York corporation from its New York office?

A. That's right.

Q. Now, the remuneration received by the corporation for such work was remuneration received from the City of New York pursuant to its contract with you. Is that correct?

A. That's right.

Q. And the corporation received no other remuneration for any of the work done by the dredge "Miami" in Gravesend Bay under this contract?

A. No.

Q. No other remuneration?

A. No.

Mr. Rosen: That is all, Mr. Referee.

The Referee: Anything else, Mr. Fridlund?

Mr. Fridlund: May—I wish—I'd like to submit a memorandum, the record is rather lengthy and I think I have sufficient recollection of the facts testified to, however, so that I can summarize it in the brief and write the brief.

The Referee: Unless you feel you want to dwell upon the facts, I can say to you that you can safely devote yourself to the legal aspects of the case.

Mr. Fridlund: It seems to me that this is primarily a question of Law.

The Referee: Because my notes are quite lengthy and detailed and I have a definite recollection of the testimony [fol. 124] here so if you want to save time you can keep from dwelling upon the facts and concentrate upon the law.

Mr. Fridlund: I'd like to do that.

The Referee: You can suit yourself. If you want to submit a memorandum of facts it's perfectly agreeable to me too.

Mr. Fridlund: How soon do you want a memorandum?

The Referee: I'll suit your convenience.
Mr. Fridlund: By the end of the month?
The Referee: If——
Mr. Rosen: Mr. Fridlund, without pressing you too hard, could you submit it just as soon as possible?
The Referee: Let's get off the record.

Discussion off the Record.

By the Referee:

Case adjourned to October 7, 1940 at two p. m. for the purpose of decision only. To be placed on the calendar without notice to the parties. Briefs to be submitted and exchanged prior to October 7, 1940.
By the Referee: Case closed.

Certified to be a True and Accurate Copy of Transcript of Minutes.

William Newrock, Reporter.

[fol. 125] NOTE RE EMPLOYER'S EXHIBIT A

This exhibit is a certified copy of a Consolidated Certificate of Enrollment and License. It is similar to Employer's Exhibit B, reproduced hereafter, and covers the enrollment of the "Miami" from April 8, 1936, to April 27, 1939. It is omitted pursuant to stipulation.

(Here follow 2 photolithographs, side folios 126-127)

Cat. No. 1271
(Rev. May 1, 1919)

Permanent or Temporary
PERMANENT
Certificate No. 466

THE UNITED STATES OF AMERICA

DEPARTMENT OF COMMERCE

OFFICIAL NO.	SIGNATURE
169908	

Measured at Los Angeles, Calif. 1923
Rebuilt at 19
Remeasured at New York, N.Y. 1929

Service: Suction Dredge
No. of crew, including master: 12
Horse-power:

Draft 7'

Consolidated Certificate of Enrollment and License

(SECTIONS 4311 AND 4312, REV. STATS., AND ACT OF APRIL 30, 1920—U. S. C., TITLE 46, SECS. 289 AND 290)

In Conformity to Title L, "Regulation of Vessels in Domestic Commerce," of the Revised Statutes of the United States

W. L. PARSONS, of New York, N.Y. Secretary,

having taken and subscribed the oath[1] required by law, and having sworn[1] that

STANDARD DREDGING CORPORATION

19 Exchange Place, Jersey City, N.J.

Incorporated under the laws of the State of New Jersey,

IS A citizen of the United States and the sole owner of the vessel called the

"MIAMI"
(Name of vessel)

of NEW YORK, N.Y.
(Home port)

and that the said vessel was built in the year 1913, at Long Beach, Calif., of[2] steel

as appears by[3] P.E.NO. 450, issued at New York, N.Y., Apr. 8, 1929, now surrendered, Preparing Enrolment

and[4] said certificate having certified that the said vessel is a[5] dredge; that she has one deck, 1 (Dredge) mast, a pilot house forward, and a cabin aft, and a stern; that her register length is 165.0 tenths feet, her register breadth 40.0 tenths feet, her register depth 9.2 tenths feet, her height[6] tenths feet; that she measures as follows:

	Tons	Tenths
Capacity under tonnage deck,	481	44
Capacity between decks above tonnage deck,		
Capacity of inclosures on the upper deck, viz: [7] Forecastle ; bridge ; poop ; break ; houses—round 16.16, side , chart , radio ; access hatchways ; [8] light and air	66	16
Gross tonnage,	547	60
Deductions under Section 4153, Revised Statutes, as amended (Section 77, title 46, United States Code):		
Crew space 66.16 not allowed; Master's cabin,		
Steering gear ; Anchor gear, ; Boatswain's stores, ;		
Chart house, ; Donkey engine and boiler, ; Radiohouse, ;		
Storage of sails, ; Propelling power (actual space [9]),		
Total deductions,		
Net tonnage,	547	

The following-described spaces, and no others, have been omitted, viz:[10] Forepeak , afterpeak , other spaces (except double bottoms for water ballast , open forecastle , open bridge , open poop , open shelter deck , cabins , companions , galley , skylights , wheelhouse , water-closets 4.58 ; anchor gear , condenser , donkey engine and boiler , steering gear , light and air over propelling machinery 518.88 , other machinery spaces .

Employer's Exhibit B

W.L. PAULSON, of New York, N.Y. Secretary,

having taken and subscribed the oath[1] required by law, and having sworn[2] that

STANDARD DREDGING CORPORATION

19 Exchange Place, Jersey City, N.J.

Incorporated under the laws of the State of New Jersey,

IS A citizen of the United States and the sole owner of the vessel called the

"MIAMI"

and that the said vessel was built in the year 1913, at Long Beach, Calif., as appears by Reg. 459 issued at New York, N.Y., Apr. 9, 1929 now surrendered. Previous Enrolment

and[3] said applicant having certified that the said vessel is a[4] single deck A(Double) mast, a Plain head, and a Square stern; that her register length is 133.1 TR feet, her register breadth 40. TR feet, her register depth 9.25 TR feet, her height[5] TR feet; that she measures as follows:

Capacity under tonnage deck,	483	44
Capacity between decks above tonnage deck,		
Capacity of inclosures on the upper deck, viz: " Forecastle ; bridge ; poop ; break ; houses—round 65.16, side , chart , radio ; excess hatchways ; " light and air	65	16
Gross tonnage,	547	60
Deductions under Section 4153, Revised Statutes, as amended (Section 77, title 46, United States Code):		
Crew space 65.16 not allowed; Master's cabin, ;		
Steering gear ; Anchor gear, ; Boatswain's stores, ;		
Chart house, ; Donkey engine and boiler, ; Radiohouse, ;		
Storage of sails, ; Propelling power (actual space "),		
Total deductions,		
Net tonnage,	547	

The following-described spaces, and no others, have been omitted, viz:[6] Forepeak , afterpeak , other spaces (except double bottoms) for water ballast , open forecastle , open bridge , open poop , open shelter deck , cabins , companions , galley , skylights , wheelhouse , water-closets 4.33 , anchor gear , condenser , donkey engine and boiler , steering gear , light and air over propelling machinery 378.88 , other machinery spaces .

And the owner[7] having agreed to the description and measurement above specified, the said vessel has been duly ENROLLED at this PORT;

LICENSE

And W.L. PAULSON, the master, having sworn that he is a citizen of the United States, that this license shall not be used for any other vessel, or for any other employment than is herein specified, or in any trade or business whereby the revenue of the United States may be defrauded:

LICENSE is hereby granted for the said vessel to be employed[8] in carrying on the COASTING TRADE (Coasting Trade, Cod Fishery, or Mackerel Fishery) for ONE YEAR from the date hereof, and no longer.

GIVEN under my hand and seal at the PORT of NEW YORK

District of NEW YORK, this TWENTY-EIGHTH day of APRIL

in the year One Thousand Nine Hundred and THIRTY-NINE

HARRY W. DURNING
Collector of Customs.

By, EDWARD FITZPATRICK

[1] Insert names and address of person by whom oath or affirmation was made.
[2] Applicant—"declare" (when necessary)
Witness—"affirm" (when necessary)
[3] Strike out words "and" or "the." If more than one person, write "he for said owning" and the verb "declares" in lieu of "declare." If the owners of shares unequal, their shares and relations (if interested persons) to each other, or part owner, must be stated. If owned by a corporation, insert name of State of incorporation.
[4] If not "single," "double," "treble," or "quadruple," so describe.
[5] Use the words "mast," "deck," "stern," "head," "number of ——," "rudder," "if they shall be of a new vessel, "new," "old," "rebuilt," or "old hulled," in the first documents of a new vessel, give the names and tons of the former vessel.
[6] For a vessel having a steam, gas or internal combustion engine, write "steam for one or all other vessel," "steam for one or all other vessel," "steam for one or all other vessel," or such like.
Where tonnage deck is upper deck, so state.
Every vessel of all nations is required to measure at each of such ports.
To be inserted in gross only when authorized by the Commissioner of Navigation.
Steam tonnage, representing actual machinery space, and in commercial propelling power.
To be inserted, if open and adequate for measurement when, as on a deck subject to load, deck to the hold, all other spaces between forecastle, afterpeak, and other water-ballast spaces must be on or above the upper deck to the load lines.
[7] In the first documents of a new vessel, give the name of the person manufacturing certificate of measurement.
[8] Insert "coasting trade," "cod fishery," or "mackerel fishery," as the case may be.

Employer's Exhibit B

Front.

90A

126

Employer's Exhibit B

Book.

INDORSEMENTS OF RENEWAL

Renewal No. 1. Port of .....

The within-described LICENSE is hereby renewed for ONE YEAR from ....., 19

(SEAL) ..... Collector of Customs.

Renewal No. 2. Port of .....

The within-described LICENSE is hereby renewed for ONE YEAR from ....., 19

(SEAL) ..... Collector of Customs.

Renewal No. 3. Port of .....

The within-described LICENSE is hereby renewed for ONE YEAR from ....., 19

(SEAL) ..... Collector of Customs.

Renewal No. 4. Port of .....

The within-described LICENSE is hereby renewed for ONE YEAR from ....., 19

(SEAL) ..... Collector of Customs.

Renewal No. 5. Port of .....

The within-described LICENSE is hereby renewed for ONE YEAR from ....., 19

(SEAL) ..... Collector of Customs.

Renewal No. 6. Port of .....

The within-described LICENSE is hereby renewed for ONE YEAR from ....., 19

(SEAL) ..... Collector of Customs.

Cat. No. 1871

DEPARTMENT OF COMMERCE

BUREAU OF MARINE INSPECTION AND NAVIGATION

CONSOLIDATED ENROLLMENT AND LICENSE

FOR THE

COASTING TRADE

(Steam, Motor Vessels, Yachts, or Pleasure)

No. 466

OF THE

Dredge

CALLED THE

KLAMT

OF

New York, N.Y.

947 gross, 947 net,

ISSUED AT THE

Port of NEW YORK, N.Y.

A.D. 19 27 , 19 29.

WHERE SURRENDERED

WHEN SURRENDERED

WHY SURRENDERED

.....

Collector of Customs

PREFERRED MORTGAGE INDORSEMENT

OF VESSEL OF 100 GROSS TONS AND OVER

MORTGAGE DESCRIPTION

(DISCHARGE NO.)

Mortgagor .....

Mortgagee .....

Indorsed ....., 19 , at m.

Total amount, $

Date of maturity ....., 19

Discharge amount, $

Port of .....

[SEAL]

Collector of Customs.

MORTGAGE DISCHARGE

(DISCHARGE NO.)

Port of .....

....., 19

The sum of $ ..... has been paid on the above-described mortgage, the certificate of such discharge being filed in this office

..... , 19 , at ..... m.

SEAL

Collector of Customs.

INDORSED DUTY OF MASTERS

(1) Port of ....., 19...

....., having taken the oath required by law, is at present master of the within-named vessel.

..... Collector of Customs.

(2) Port of ....., 19...

....., having taken the oath required by law, is at present master of the within-named vessel.

..... Collector of Customs.

(3) Port of ....., 19...

....., having taken the oath required by law, is at present master of the within-named vessel.

..... Collector of Customs.

(4) Port of ....., 19...

....., having taken the oath required by law, is at present master of the within-named vessel.

..... Collector of Customs.

(5) Port of ....., 19...

....., having taken the oath required by law, is at present master of the within-named vessel.

..... Collector of Customs.

(6) Port of ....., 19...

....., having taken the oath required by law, is at present master of the within-named vessel.

..... Collector of Customs.

(7) Port of ....., 19...

....., having taken the oath required by law, is at present master of the within-named vessel.

..... Collector of Customs.

(8) Port of ....., 19...

....., having taken the oath required by law, is at present master of the within-named vessel.

..... Collector of Customs.

(9) Port of ....., 19...

....., having taken the oath required by law, is at present master of the within-named vessel.

..... Collector of Customs.

(10) Port of ....., 19...

....., having taken the oath required by law, is at present master of the within-named vessel.

..... Collector of Customs.

(11) Port of ....., 19...

....., having taken the oath required by law, is at present master of the within-named vessel.

..... Collector of Customs.

(12) Port of ....., 19...

....., having taken the oath required by law, is at present master of the within-named vessel.

..... Collector of Customs.

(13) Port of ....., 19...

....., having taken the oath required by law, is at present master of the within-named vessel.

..... Collector of Customs.

(14) Port of ....., 19...

....., having taken the oath required by law, is at present master of the within-named vessel.

..... Collector of Customs.

INSPECTION CERTIFICATE EXPIRES

1 ....., 19 — Port of ..... Deputy Collector of Customs.

2 ....., 19 — Port of ..... Deputy Collector of Customs.

3 ....., 19 — Port of ..... Deputy Collector of Customs.

4 ....., 19 — Port of ..... Deputy Collector of Customs.

5 ....., 19 — Port of ..... Deputy Collector of Customs.

[fol. 128] EMPLOYER'S EXHIBIT C

Standard Dredging Corporation

(a New York Corporation)

November 9, 1938.

The District Engineer, New York District, Room 710 Army Building, 39 Whitehall Street, New York, N. Y.

DEAR SIR:

We request a permit for dredging an area shown on the attached map, in Gravesend Bay near Norton Point. The depth is to be from twenty-five (25) to fifty (50) feet below M.L.W. in the places dredged, and we estimate that between two and three million yards are to be removed. We desire to deposit the material on the New York City Department of Parks Parkway Fill, as shown on the attached map, extending within the bulkhead and shore lines from Fort Hamilton to Bay Parkway, along Gravesend Bay.

Very truly yours, Standard Dredging Corporation,
—— ——, Executive Vice President.

C. B. Clarke. hf.
encls.

[fol. 129] EMPLOYER'S EXHIBIT D

In reply refer to
File No. Permits 3548/3

Public Notice No. 284

WAR DEPARTMENT

United States Engineer Office

New York District, New York, N. Y.

Room 710, Army Building, 39 Whitehall Street

New York City

November 16, 1938.

Public Notice

To whom it may concern:

Application has been made to this office by the Standard Dredging Corporation for a War Department permit to

dredge in Gravesend Bay, north of Norton Point, Borough of Brooklyn, New York City, N. Y.

Plans showing the proposed work are on file in this office and may be seen by interested parties. A rough sketch is shown on the reverse of this sheet. The plans propose dredging to a depth of from 25 to 30 feet below mean low water, dredged material to be deposited shoreward of a proposed bulkhead to be constructed by the Department of Parks, City of New York, in connection with the Shore Parkway.

The decision as to whether or not a permit will be issued on the plans submitted must rest primarily upon the effect of the proposed work on navigation. Any criticisms or protests regarding the plans from the standpoint of navi- [fol. 130] gation should be submitted to this office prior to November 26, 1938, as it is desired to act on the application on that date.

For the District Engineer:

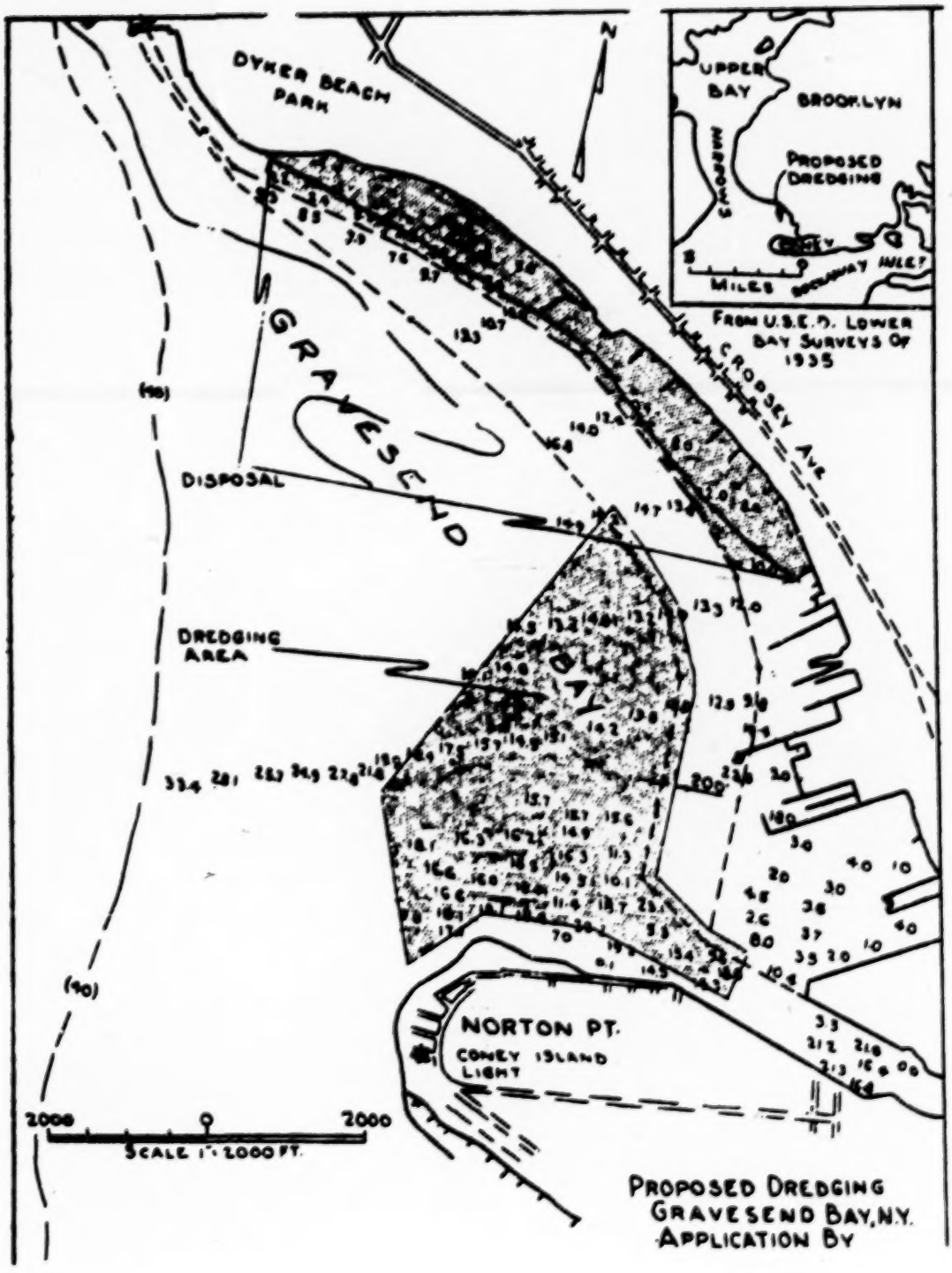
(s) J. F. C. Hyde, Major, Corps of Engineers, Assistant.

(Over)

(See Opposite)

(Here follows 1 photolithograph, side folio 131)

Employer's Exhibit D



[fol. 132] EMPLOYER'S EXHIBIT E

WAR DEPARTMENT

United States Engineer Office

New York District, N. Y.

Room 710, Army Building, 39 Whitehall Street

New York, N. Y.

Refer to File No.
Permits 3548/4

December 2, 1938.

Mr. C. B. Clarke, Executive Vice President, Standard Dredging Corporation, 80 Broad Street, New York City, N. Y.

DEAR SIR:

Referring to your application dated November 9, 1938 for a War Department permit to dredge in Gravesend Bay north of Norton Point, Borough of Brooklyn, New York City, N. Y., there is forwarded herewith permit for that work issued today.

Attention is invited to condition (i) of the permit. Notice should be sent to the U. S. Engineer Office, New York District, New York, N. Y., Room 710, Army Building, 39 Whitehall Street, New York City.

You are cautioned that if any material changes in the location or plans of the structure or work are found necessary on account of unforeseen or altered conditions or other causes, revised plans should be submitted promptly to the District Engineer to the end that these revised plans, if found unobjectionable from the viewpoint of navigation, [fol. 133] may receive the approval required by law before construction thereupon is begun.

Very truly yours, (S.) C. L. Hall, Colonel, Corps of Engineers, District Engineer.

1 Inclos.—
Permits 3548/5 (Permit)

[fol. 134] EMPLOYER'S EXHIBIT E-1

JPG/EHD/LSD

War Department

Note.—It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State or local laws or regulations, nor does it obviate the necessity of obtaining *State assent* to the work authorized. It merely expresses the assent of the Federal Government so far as concerns the public rights of Navigation. (See *Cummings* v. *Chicago,* 188 U. S., 410.)

Permit

United States Engineer Office. New York District, New York, N. Y., 39 Whitehall Street, New York City, December 2, 1938.

Standard Dredging Corporation, 80 Broad Street, New York City, New York.

Permits 3548 5

GENTLEMEN:

Referring to written request dated November 9, 1938 and signed by Mr. C. B. Clarke, Executive Vice President.
[fol. 135] .....
I have to inform you that, upon the recommendation of the Chief of Engineers, and under the provisions of Section 10 of the Act of Congress approved March 3, 1899, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," you are hereby authorized by the Secretary of War, to dredge to a maximum depth of 50 feet below mean low water, dredged material to be deposited shoreward of a bulkhead to be constructed by the City of New York on or shoreward of the established bulkhead line or as authorized under War Department permit, ...

(Here describe the proposed structure of work.)

in Gravesend Bay, ...

(Here to be named the river, harbor, or waterway concerned.)

north of Norton Point, Borough of Brooklyn, New York City, N. Y., ...
(Here to be named the nearest well-known locality—preferably a town or city—and the distance in miles and tenths from some definite point in the same, stating whether above or below or giving directions by points of compass.)
in accordance with the plans shown on the drawing attached hereto and file marked Permits 3548/2, ...
(Or drawings; give file number or other definite identification marks.)
subject to the following conditions:

(a) That the work shall be subject to the supervision and approval of the District Engineer, Engineer Department at [fol. 136] Large, in charge of the locality, who may temporarily suspend the work at any time, if in his judgment, the interests of navigation so require.

(b) That any material dredged in the prosecution of the work herein authorized shall be removed evenly, and no large refuse piles, ridges across the bed of the waterway, or deep holes that may have a tendency to cause injury to navigable channels or to the banks of the waterway shall be left. If any pipe, wire, or cable hereby authorized is laid in a trench, the formation of permanent ridges across the bed of the waterway shall be avoided and the back filling shall be so done as not to increase the cost of future dredging for navigation. Any material to be deposited or dumped under this authorization, either in the waterway or on shore above high-water mark, shall be deposited or dumped at the locality shown on the drawing hereto attached, and, if so prescribed thereon, within or behind a good and substantial bulkhead or bulkheads, such as will prevent escape of the material into the waterway. If the material is to be deposited in the harbor of New York, or in its adjacent or tributary waters, or in Long Island Sound, a permit therefor must be previously obtained from the Supervisor of New York Harbor, Army Building, New York City.

(c) That there shall be no unreasonable interference with navigation by the work herein authorized.

(d) That if inspections or any other operations by the United States are necessary in the interests of navigation, [fol. 137] all expenses connected therewith shall be borne by the permittee.

(e) That no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure.

(f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if, in the opinion of the Secretary of War, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required, upon due notice from the Secretary of War, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of War may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.

(g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation [fol. 138] or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

(h) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the Bureau of Lighthouses, Department of Commerce, shall be installed and maintained by and at the expense of the owner.

(i) That the permittee shall notify the said district engineer at what time the work will be commenced, and as far in advance of the time of commencement as the said district engineer may specify, and shall also notify him promptly, in writing, of the commencement of work, suspension of work, if for a period of more than one week, resumption of work, and its completion.

(j) That if the structure or work herein authorized is not completed on or before the 31st day of December, 1941, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

By authority of the Secretary of War:

C. L. Hall, Colonel, Corps of Engineers, District Engineer.

1 Inclos.—

Permits 3548/2 (Drawing)

[fol. 139] Copy furn. Chief of Engrs., U. S. Army, with drawing.

Copy furn. Divn. Engr. N.A.D., with drawing.

Copy furn. Supervisor of N. Y. Harbor, with drawing.

Copy furn. Construction Section of the Operations Division with drawing.

Form No. 96.

Revised March 16, 1936.

[Annexed hereto is a map covering the proposed dredging in Gravesend Bay. It is identical with the map annexed to Employer's Exhibit D, reproduced heretofore, except that it bears the words "U. S. Bulkhead Line" and "U. S. Pierhead Line". It is omitted pursuant to stipulation.]

[fol. 140] EMPLOYER'S EXHIBIT F

Treasury Department

Washington

(Emblem)

Office of

Commissioner of Internal Revenue

Address Reply to

Commissioner of Internal Revenue

and Refer to

IT:RR
RFW

Jan. 4, 1937.

Mr. Clarence W. De Knight, Hibbs Building, Washington, D. C.

SIR:

Reference is made to Bureau letter dated August 21, 1936, in which it was held, among other things, that dredges used solely for digging under water, and not for navigation or the transportation even of the material which they bring up from the lake or river beds, are not vessels within the meaning of section 907 (c) (3) and section 811 (b) (5) of the Social Security Act. The case has been reconsidered.

In City of Los Angeles v. United Dredging Company, 14 F. (2d) 364 (1926), the court held that barges with dredging machinery thereon are "water craft capable of being used as a means of transportation on water; that they are built to be used in navigable waters, and are intended to transport machinery, supplies, and crews necessary to dig [fol. 141] out mud and other obstructions in harbors in aid of navigation." (p. 365) See also McMaster v. One Dredge, 95 F. 832 (1899); Bowers Hydraulic Dredging Company v. Federal Construction Company, 148 F. 290 (1906).

This office now holds that dredges which are intended and adapted for navigation and transportation by water of their crews, supplies and machinery, from point to point, in carrying on the work of deepening and removing obstructions from channels and harbors in aid of navigation and

commerce are vessels within the meaning of section 811 (b) (5) and section 907 (c) (3) of the Act. Where such dredges are operated by the Standard Dredging Company of New York City in navigable waters of the United States, the services performed by the officers and members of the crew come within the excepting provisions of section 907 (c) (3) and the wages payable to the employees on account of such services should not be included in the computation of wages for the purpose of determining the employer's tax. If such dredges are documented under the laws of the United States, the services of the officers and members of the crew come within the excepting provisions of section 811 (b) (5) of the Act.

Bureau ruling dated August 21, 1936 is hereby modified accordingly.

Respectfully, Chas. T. Russell, Acting Commissioner.

(Here follows 1 photolithograph, side folios 142-143)

Employer's Exhibit C

[fols. 144-145] NOTE RE EMPLOYER'S EXHIBIT H

This exhibit consists of the wage schedule of Mike Cassaretakis from February 4, 1939 to August 17, 1939. It is omitted pursuant to stipulation and Employer-Appellant concedes claimant's wages for the relevant period of his employment.

NOTE RE EMPLOYER'S EXHIBITS I AND J

These exhibits consist of the weekly pay checks of Mike Cassaretakis from February 10, 1939 to August 12, 1939. They are omitted pursuant to stipulation and Employer-Appellant concedes claimant's wages for the relevant period of his employment.

[fol. 146] BEFORE DEPARTMENT OF LABOR

STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed that Employer's Exhibits A, that part of E-1 consisting of a map of proposed dredging, H, I and J, may be omitted from this Case on Appeal, but the originals thereof may be produced and referred to by counsel in their briefs and upon the argument with the same force and effect as if reproduced in said Case on Appeal.

Dated, this 28th day of August, 1941.

Kirlin Campbell Hickox Keating & McGrann, Attorneys for Appellant; John J. Bennett, Jr., Attorney-General, Attorney for Respondent, by Julia M. Cook, Assistant Attorney General.

[fol. 147] STIPULATION SETTLING CASE

It is hereby stipulated by and between the attorneys for the respective parties hereto, that the foregoing case contains all of the evidence taken upon the hearings and all exceptions of all parties and that an order may be entered herein settling the same as such and ordering the same on file without further notice.

Dated, New York, August 28th, 1941.

Kirlin Campbell Hickox Keating & McGrann, Attorneys for Appellant. John J. Bennett, Jr., Attorney for Respondent. By: Julia M. Cook, Assistant Attorney General.

[fol. 148] STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the Notices of Appeals and material parts of the other papers in relation to the foregoing claim now on file in the office of the Department of Labor, and certification thereof pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated New York, August 28, 1941.

Kirlin Campbell Hickox Keating & McGrann, Attorneys for Appellant. John J. Bennett, Jr., Attorney General, Attorney for Respondent. By: Julia M. Cook, Assistant Attorney General.

[fol. 149] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

NOTICE OF APPEAL TO COURT OF APPEALS—January 23, 1942

[Title omitted]

SIR:

Please take notice that Frieda S. Miller, as Industrial Commissioner, hereby appeals to the Court of Appeals of the State of New York from an order of the Appellate Division of the Supreme Court of the State of New York for

the Third Judicial Department, made and entered on the 1st day of December, 1941, unanimously reversing the decision of the Unemployment Insurance Appeal Board of the New York State Department of Labor, dated the 3rd day of March, 1941, and the said Appellant hereby appeals from the whole and each and every part of the said order.

Dated: Albany, New York, January 23, 1942.

Yours, etc., John J. Bennett, Jr., Attorney General, Attorney for Appellant, The Capitol, Albany, New York. By W. Gerard Ryan, Assistant Attorney General, 112 State Street, Albany, New York.

[fol. 150] To: Kirlin Campbell Hickox Keating & McGrann, Esqs., Attorneys for Employer-Respondent, 120 Broadway, New York, N. Y. Mike Cassaretakis, Claimant, 311 West 27th Street, New York, N. Y. Unemployment Insurance Appeal Board, 342 Madison Avenue, New York, N. Y. —— ——, Clerk, Appellate Division, Court House, Albany, N. Y.

[fol. 151] In Supreme Court of New York, Appellate Division

Order Appealed From—Entered December 1, 1941

Present: Hon. James P. Hill, Hon. John C. Crapser, Hon. F. Walter Bliss, Hon. Christopher J. Heffernan, Hon. Gilbert V. Schenck, Justices

In the Matter of the Claim for Benefits under Article 18 of the Labor Law made by Mike Cassaretakis, Claimant,

Standard Dredging Corporation, Employer-Appellant

Frieda S. Miller, as Industrial Commissioner, Respondent

The above named appellant having appealed to this Court from a decision of the New York Unemployment Insurance Appeal Board, No. 4014-40, made the 3rd day of March, 1941, holding that the above named claimant worked in employment covered by the New York Unemployment Insurance Law;

And, said appeal having come on for hearing before this Court at an Unemployment Insurance Term thereof com-

mencing on the 2nd Monday (the 10th day) of November, 1941, to wit, on the 11th day of November, 1941;

[fol. 152] And, H. Maurice Fridlund, Esq., of Kirlin, Campbell, Hickox, Keating & McGrann, of No. 120 Broadway, New York, N. Y., having submitted on behalf of said appellant;

And, W. Gerard Ryan, Esq., Assistant Attorney General of the State of New York, Albany, N. Y., having submitted the case on behalf of the Industrial Commissioner of the State of New York, respondent;

And, reply briefs on behalf of said appellant having been filed with this Court on the 19th day of November, 1941, pursuant to permission granted by this Court;

And, due deliberation having been had, and this Court having unanimously held in its decision handed down November 19, 1941, that said claimant did not work in employment covered by the New York Unemployment Insurance Law:

It Is Ordered, that said decision of the Appeal Board, No. 4014-40, made on the 3rd day of March, 1941, be and the same hereby is unanimously reversed, with costs to appellant.

(S.) John S. Herrick, Clerk. (Official Stamp.)

(Entered, December 1, 1941.)

[fol. 153] In Supreme Court of New York, Appellate Division

In the Matter of the Claim for Benefits under Article 18 of the Labor Law made by Mike Cassaretakis, Claimant,

Standard Dredging Corporation, Appellant,

Frieda S. Miller, as Industrial Commissioner, Respondent

Memorandum Decision—November 19, 1941

Appeal by employer-appellant from a decision of the Unemployment Insurance Appeal Board, which held that the New York Unemployment Insurance Law covered the services of the claimant as a cook and cook's helper aboard employer-appellant's dredge.

Claimant was employed by appellant first as a cook's helper and later as a cook aboard a hydraulic suction dredge documented as a vessel of the United States. His duties consisted of preparing meals, waiting on tables and cleaning up the kitchen and dining room. He ate his meals on board the dredge and customarily slept there. The dredge on which he was employed was operating on navigable waters of the state.

Clearly, claimant, a cook, was a member of the crew of a documented vessel operating on navigable waters. The [fol. 154] dredge was licensed and enrolled as a vessel of the United States. Accordingly, claimant is not subject to the jurisdiction of the Unemployment Insurance Law but is subject solely in respect of the matter in controversy here to the admiralty and maritime jurisdiction of the United States. (Article III, Section 2, Constitution of the United States.)

The grant of admiralty jurisdiction to the federal government was intended to commit direct control and to relieve maritime commerce of unnecessary burdens by reason of discordant legislation of the several states. (Knickerbocker Ice Co. v. Stewart, 253 U. S. 149.)

The Social Security Act specifically excepts from the term employment "services performed as an officer or member of the crew of a vessel on the navigable waters of the United States." (Section 1607 (c) (4) Internal Revenue Code. See also Matter of Bergen v. Miller, Industrial Commissioner, decided by this court November, 1941.)

Decision of the Unemployment Insurance Appeal Board should be reversed.

Decision of the Unemployment Insurance Appeal Board reversed, with costs to appellant.

Hill, P. J., Crapser, Bliss, Heffernan and Schenck, JJ., concur.

(No opinion written unless indicated hereon.)

[fol. 155] In Supreme Court of New York, Appellate Division

Affidavit of No Opinion—April 23, 1942

State of New York,
County of Albany, ss.:

W. Gerard Ryan, being duly sworn, deposes and says that he is an Assistant Attorney General in the office of John J. Bennett, Jr., Attorney General of the State of New York, attorney for the appellant herein, and that no written opinion or memorandum was handed down by the Appellate Division in deciding this appeal, except the memorandum decision of the Appellate Division handed down November 19, 1941, as hereinbefore printed.

W. Gerard Ryan.

Sworn to before me this 23rd day of April, 1942.
Harold F. Lea, Notary Public, Albany County.

In Supreme Court of New York, Appellate Division

Stipulation Waiving Certification to the Court of Appeals—April 23, 1942

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consist of true and correct copies of the papers on appeal to the Appellate Division, Third Department, the order of the Appellate Division appealed from, the memorandum decision of the Appel-
[fol. 156] late Division, and the notice of appeal as of right to the Court of Appeals, all of which are now on file in the office of the Clerk of the Appellate Division, Third Department, Albany, New York, and that certification thereof is hereby expressly waived.

Dated Albany, New York, April 23, 1942.

John J. Bennett, Jr., Attorney General, Attorney for Appellant, by W. Gerard Ryan, Assistant Attorney General. Kirlin, Campbell, Hickox, Keating & McGrann, Attorneys for Respondent.

[fol. 157] IN THE COURT OF APPEALS OF NEW YORK

OPINION—October 15, 1942

In the Matter of the Claim of Mike Cassaretakis.

Frieda S. Miller, as Industrial Commissioner of the State of New York, Appellant, Standard Dredging Corporation, Respondent, and Five Other Cases.

Appeals from two orders of the Appellate Division of the Supreme Court in the third judicial department, entered December 1, 1941 and December 10, 1941, respectively, which reversed decisions of the Unemployment Insurance Appeal Board determining that the claimants worked in employments subject to the unemployment insurance law (Labor Law, art. 18 [Cons. Laws, ch. 31]) and were entitled to be credited with their earnings in such employments as a basis for unemployment insurance benefits.

Appeal, by permission, from four orders of the Appellate Division of the Supreme Court in the third judicial department, entered November 19, 1941, each of which unanimously affirmed a decision of the Unemployment Insurance Appeal Board determining that the claimant in each such proceeding did not work in an employment subject to the unemployment insurance law (Labor Law, art. 18 [Cons. Laws, ch. 31]) and was not entitled to be credited with his earnings in such employment as a basis for unemployment insurance benefits.

John J. Bennett, Jr., Attorney-General (*Henry Epstein, W. Gerard Ryan* and *Francis R. Curran* of counsel), for appellant.

H. Maurice Fridlund, Jules Haberman, Frank C. Mason, Edward K. Bachman, James Ragan Roberts, Arthur E. Goddard, Robert B. Lisle and *Edward L. P. O'Connor* for respondents.

FINCH, J. These six appeals present the question whether the New York unemployment insurance law (Labor Law, art. 18; Cons. Laws, ch. 31) imposing a pay-roll tax upon all employers of four or more employees, without discrimination and without exception here material, is applicable to marine employments.

In four of the above cases the Unemployment Insurance Appeal Board has found that the claimants had been employed as members of the crews of vessels on the navigable

waters of the United States and for that reason the Board held that they were not covered by the unemployment insurance law. In the two remaining cases (*Matter of Cassaretakis* and *Matter of Bergen*) the Board has found that the claimants, although engaged in marine employments, had not been employed as members of the crews of vessels on the navigable waters of the United States, and on this basis held that they were covered by the statute in question.

Upon appeal to the Appellate Division, the decision of the Board in the four cases first mentioned above was sustained. In the other two cases, however, the determinations were reversed upon the ground that, by reason of the admiralty clause of the Federal Constitution, the unemploy-
[fol. 158] ment insurance statute may not be held applicable to maritime employments.

The definition of employment contained in the New York Act (Labor Law, § 502) is admittedly sufficiently broad to cover all maritime employments, including service as an officer or member of a crew of a vessel upon navigable waters of the United States, provided the whole or greater part of such employment is performed within this State. The Federal statute (U. S. Code, tit. 26, § 1607, subd. c), on the other hand, specifically excludes from the tax levied thereunder services rendered as officer or members of a crew of a vessel upon the navigable waters of the United States.

Whether or not an individual is a member of a crew of a vessel on the navigable waters of the United States presents primarily a question of fact which turns generally on whether the individual serves the ship in her navigation. (*South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 259.) In consequence the determination of the Appeal Board, if sustained by substantial evidence, is conclusive upon the courts. (Labor Law, art. 18, § 534; *Matter of Morton*, 284 N. Y. 167.) Upon this record there is substantial evidence to sustain the findings of fact in this regard of the Appeal Board. As to the four claimants who were found to be members of the crews of vessels, Sheredos was a cook on a self-propelled vessel carrying petroleum between points in New York and New Jersey; Schein was an attendant on a speed boat which transported passengers from a New York city pier to the World's Fair; Knowlson was second engineer on a tugboat; Smith was a fireman on a lighter. All were plainly members of crews of vessels. On

the other hand, Cassaretakis was assistant cook on board a dredge which was employed in a land filling operation in connection with the construction of a public highway. Bergen was a grain-trimmer on a floating grain elevator, his work being in connection with transfer of grain from one barge to another for purposes of further transportation. The employment of these two latter claimants, therefore, may be deemed incidental to construction and stevedoring operations, respectively, rather than to navigation. In consequence, Cassaretakis and Bergen, although concededly engaged in general maritime employment, were not members of crews of vessels on the navigable waters of the United States. These two claimants have, moreover, been found to be engaged in employment the whole or greater part of which was transacted within this State.

Two questions of law are raised, (1) whether there is constitutional objection to the application of the statute in question to maritime employments generally, and (2) if there is no such constitutional objection, whether the Congress preempted that part of the field relating to navigation by enacting a statutory prohibition against coverage by the State law, of officers and members of the crew of a vessel on the navigable waters of the United States.

In order to induce the several States to enact unemployment insurance statutes, the Federal government, by the [fol. 158a] Federal Unemployment Tax Act (Internal Revenue Code, U. S. Code, tit. 26, §§ 1600, 1601) levied a pay-roll tax upon employers, with certain exceptions, but allowed a credit up to ninety per cent of the Federal pay-roll tax to employers on account of contributions paid for State unemployment insurance. On its part the State of New York has levied a pay-roll tax upon employers measured by a percentage of the pay-roll and assessed upon all employers generally without regard to the nature of employment, with certain exceptions not here material (Labor Law, art. 18, §§ 515, 516). Neither the National nor the State government contributes anything to the fund. The moneys collected by means of this tax are used for the relief of the unemployed, concededly an object within the powers of the State. (*Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495.)

This tax is an excise based upon the exercise of the privilege of employing individuals. (*Steward Machine Co.* v. *Davis*, 301 U. S. 548, 578-583; *Carmichael* v. *Southern Coal*

& Coke Co., supra; Patton v. Brady, 184 U. S. 608.) The obligations of the employer under this law are not to his employees but to the State. Likewise, claimants of benefits assert their rights against the State and not against the employer. The employer's duty to pay contributions and the employee's right to receive benefits are independent of each other. The employer must continue to pay the tax although none of his employees ever becomes entitled to benefits through lack of employment; the employee has a right to receive benefits upon becoming unemployed although his employer has failed to contribute.

A mere statement of this State law demonstrates that it does not modify or attempt to modify, alter or supplement the rights and liabilities of the parties to any maritime contract, nor does it touch remedies enforceable in admiralty. This tax exists independently of the employment out of which it arises. The measure of the tax by the amount of wages paid does not make the tax less independent of the occupation. Conceding that these claimants performed services under a maritime contract of employment, nothing in the challenged statute in any way changes, modifies or affects the reciprocal rights and duties of the employer and employee arising out of the maritime contracts or the remedies enforceable in admiralty. There is a fundamental distinction between statutes which interfere with the rights and obligations of the parties to a maritime contract, as between themselves, and a statute which effects no such interference.

The power to levy such an excise tax and to use the funds thus raised for local purposes is a sovereign power reserved to the States, of which they were not deprived by the Constitution of the United States. In *Carmichael* v. *Southern Coal & Coke Co.*, Mr. Justice Stone (now chief Justice) said: "Taxes * * * may likewise be laid on the exercise of personal rights and privileges. As has been pointed out by the opinion in the *Chas. C. Steward Machine Co.* case, such levies, including taxes on the exercise of the right to employ or to be employed, were known in England and [fol. 159] the Colonies before the adoption of the Constitution, and must be taken to be embraced within the wide range of choice of subjects of taxation, which was an attribute of the sovereign power of the States at the time of the adoption of the Constitution, and which was reserved to them by that instrument." (p. 505.)

It is contended, however, that the State may not thus exercise its reserved powers of taxation because it involves a conflict with paramount powers vested in the Federal government in two respects; *first*, the State law is alleged to interfere with and burden maritime commerce in its national and international aspects as to which Congress alone has power to legislate; *second*, the State law is also alleged to contravene the essential purposes of and to work prejudice to characteristic features of the maritime law, and to interfere with its proper harmony and uniformity in its interstate and international relations.

The paramount power of Congress to legislate in the field of maritime law is implied from the grant to the Federal courts in section 2 of article III of the Federal Constitution, of judicial power in all cases involving admiralty and maritime jurisdiction. It is, however, well settled that in the maritime field, just as in the field of interstate commerce generally, the state has power to act in matters of merely local concern, which do not require uniform national legislation. (*Cooley* v. *Board of Wardens*, 12 How. [U. S.] 299). One engaged in an interstate business may be lawfully subjected to a state tax upon the instruments employed in that business (*Western Union Telegraph Co.* v. *Attorney-General*, 125 U. S. 530), and this is so even though such commerce is maritime in nature. (*Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299, 305.)

In addition, by section 1606, subd. (a) of the Federal Tax Act, the Congress has declared that state unemployment insurance laws may be applied to interstate commerce. And in *Perkins* v. *Pennsylvania*, 314 U. S. 586, affg., 342 Penn St. 529 the Supreme Court has held that there is no constitutional obstacle under the commerce clause to the application of the Pennsylvania unemployment insurance law to those employed in interstate commerce. This would seem to be a conclusive determination that unemployment among those engaged in interstate commerce in general is a matter of local concern as to which no uniform national legislation is needed and in which field, therefore, the states may constitutionally legislate.

As to the second objection noted above and based upon the limitations upon state legislation stated in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, it would seem to be a sufficient answer to repeat that the enactment in question is a taxing statute designed to raise funds for a state pur-

pose. It does not, therefore, attempt to alter the contract of employment between master and servant or to change the rights and remedies enforceable in admiralty as incidental to that relationship. It does not create any new rights or liabilities between the parties. Nothing contained [fol. 160] therein would cause a court of admiralty to alter in any respect the body of law which it applies to the cases pending before it.

That a state may, within prescribed limits, enter into the field of maritime law and add to or modify remedies enforceable in admiralty was conceded by Mr. Justice McReynolds in the *Jensen* case. In *Just* v. *Chambers* (312 U. S. 383) a statute of the State of Florida, providing that a cause of action for personal injuries shall survive the death of the tort feasor, was held to be applicable in a court of admiralty to an action against the owner of a vessel on account of injuries occurring on navigable waters within the State boundaries. The State law, it was said, did not offend the criteria of essential purpose and uniformity laid down in the *Jensen* case. If, therefore, the states may, within the prescribed limits, actually add to the remedies under maritime law, *a fortiori*, the legislation in the case at bar may not be held to have overridden the limitations set forth in the *Jensen* case.

Respondents point to a line of authorities (*Southern Pacific* v. *Jensen, supra; Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Western Fuel Co.* v. *Garcia*, 257 U. S. 233; *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469) holding workmen's compensation statutes invalid as interfering with the characteristic features and essential uniformity of admiralty law. These cases all rest upon the principle that the workmen's compensation laws set aside the common law rules respecting the rights and liabilities of employer and employee and substituted new rules for determining such rights and liabilities. These statutes become a part of the contract and thereby directly affect the rights and duties between the parties. As was said by this court in *Matter of Doey* v. *Howland Co.* (224 N. Y. 30, 36): "An award under the Workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract. (*Matter of Post* v. *Burger & Gohlke*, 216 N. Y. 544.) The contract of employment, by

virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for injuries sustained, or if death results, a certain sum to dependents."

A clear distinction between these cases and that of the unemployment insurance law is that the latter does not in any way operate upon the contract of employment or interfere with maritime and admiralty jurisdiction. The payment of an excise tax upon the privilege of employing others can no more be considered an unwarranted intrusion by the states into admiralty jurisdiction than can numerous other state taxes previously upheld; for instance, franchise taxes upon towing companies (*People ex rel. Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549); taxation of insurance companies upon the writing of marine insurance policies (*Aetna Ins. Co.* v. *Houston Oil & Transport Co.*, 49 Fed. Rep. [2d] 121); taxes upon shipping (*Transportation Co.* v. *Wheeling*, 99 U. S. 273; and tolls levied upon interstate and foreign shipping using state-[fol. 161] improved waterways. (*Sands* v. *Manistre River Improvement Co.*, 123 U. S. 288.)

It follows that there is no constitutional objection to coverage of maritime employments by the Unemployment Insurance Act of New York State.

We are thus brought to the second question, namely, whether by virtue of the provisions of section 1607 (subd. c) (par. 4) of the Internal Revenue Code (U. S. Code tit. 26), the officers and members of the crew of a vessel on the navigable waters of the United States have been specifically excluded by Congress from coverage by state laws. We may assume that Congress has the constitutional right under the admiralty clause of the Federal Constitution, to exclude maritime employments from coverage by state unemployment insurance.

In other words does the fact that the Federal Act in the case at bar exempts from its operation the officers and crews of vessels on navigable waters prevent the states from covering maritime employment in the unemployment insurance laws which they have enacted?

From the nature of the independent power reserved to the states of taxing for their own support and to promote the general welfare of their inhabitants, there has been developed the principle that it will not be presumed that

Congress intended to exclude the reserved powers of the state by virtue of paramount powers vested in Congress by the Federal Constitution unless an actual conflict exists between Federal and State legislation. In *Savage* v. *Jones* (225 U. S. 501) the court lays down this principle (at p. 533): "But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State."

A comparison of the Federal tax act and our State unemployment insurance act shows that there is no actual conflict between them even when the State act is construed to cover employments expressly exempted under the Federal taxing statute.

The Federal statute, of course, is not an unemployment insurance law. It is a mere taxing statute but contains a provision allowing ninety per cent of contributions exacted thereunder to be credited by employers against contributions paid under certified state systems. This credit arrangement was designed to give the states an incentive to enact their own unemployment insurance laws and to protect those states which enacted such laws against being put at a competitive disadvantage as against other states which might fail to take such action. Congress evidently believed that these objects could be accomplished by taxing only certain kinds of employment while exempting other kinds. The states in creating their unemployment systems, on the other hand, had different objectives in view in canvassing [fol. 162] the kinds of employment to be covered or excluded under their statutes. Their problem was to decide what types of employment seriously required the protection of an unemployment compensation law and what types could practically be included within such a system. Whatever types of employment the Congress might exclude, the states might exempt wholly different types upon the ground that employees in these categories did not require such protection or else that it would be impracticable or impolitic to furnish them with such protection. There is, therefore, no necessary similarity as to the types of employment either covered or exempted by the Federal and state statutes respectively.

The legislative history and the judicial interpretation of the Federal statute amply demonstrate that it was not intended thereby to strait-jacket the states in the enactment of their own unemployment insurance laws. (See Senate Report, No. 628, Cal. No. 661, 74th Congress, p. 14; *Steward Machine Co.* v. *Davis, supra,* at pp. 593, 594.) The conclusion is inescapable that Congress intended to leave to the states the widest possible latitude in setting up their unemployment compensation systems both as to the kind and extent of coverage provided. This broad policy may not be overriden by the exemptions contained in section 1607 (subd. c) (par. 4).

One word should be said in conclusion as to the argument advanced that great practical difficulties lie in the way of the states providing benefits for seamen, the nature of whose work may take them into many other states and even into foreign parts. A picture is drawn of the hopeless confusion into which maritime employment may be plunged if a number of states attempted to apply conflicting state statutes to the same employer-employee relationship. The difficulty conjured up would appear to be more imaginary than real and in no event could affect the result arrived at herein. It may be that Congress will in future decide to appropriate the entire marine field to a uniform unemployment insurance system. Such congressional action might effectively oust the states from the field because of the paramount power vested in Congress by section 2 of article III of the Federal Constitution. It is sufficient for the purpose of these appeals, however, to say that no such obstacle stands in the way of state legislation at the present time.

It follows that in the cases of the claimants, Cassaretakis and Bergen, the orders of the Appellate Division should be reversed and the determination of the Unemployment Insurance Appeal Board affirmed; in the cases involving Sheredos, Knowlson, Schein and Smith, the orders of the Appellate Division and the determination of the Unemployment Insurance Appeal Board should be reversed and the cases remitted to such Appeal Board for proceedings in accordance with this opinion, all with costs in this court and in the Appellate Division.

Lehman, Ch. J., Loughran, Rippey, Lewis, Conway and Desmond, JJ., concur.

Ordered accordingly.

[fol. 163] IN COURT OF APPEALS

REMITTITUR—October 16, 1942

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 15th day of October, in the year of our Lord one thousand nine hundred and forty-two, before the Judges of said Court.

Witness, the Hon. Irving Lehman, Chief Judge, Presiding. John Ludden, Clerk.

Remittitur October 16, 1942.

In the Matter of The Claim for Benefits under Article 18 of the Labor Law, made by MIKE CASSARETAKIS

Be It Remembered, That on the 12th day of May, in the year of our Lord one thousand nine hundred and forty-two, Frieda S. Miller, as Industrial Commissioner, the appellant in this cause, came here unto the Court of Appeals, by John J. Bennett, Jr., Attorney General, and filed in the said [fol. 164] Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Standard Dredging Corporation the respondent in said cause, afterwards appeared in said Court of Appeals by Kirlin, Campbell, Hickox, Keating & McGrann, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Henry Epstein, of counsel for the appellant, and by Mr. H. Maurice Fridlund, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and determination of Unemployment Insurance Appeal Board affirmed with costs in this court and in the Appellate Division.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court there to be proceeded upon according to law.

Therefore, it is considered that the said order of Appellate Division be reversed and determination of Unemploy-

ment Insurance Appeal Board affirmed with costs in this [fol. 165-166] court and in the Appellate Division, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Judicial Department before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

[fol. 167] In Supreme Court of New York, Appellate Division

Judgment on Remittitur—October 22, 1942

At a term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Department, held at the Court House, City of Albany, State of New York, commencing on the 21st day of September, 1942.

Present Hon. James P. Hill, Presiding Justice; Hon. John C. Crapser, Hon. F. Walter Bliss, Hon. Christopher J. Heffernan, Hon. Gilbert V. Schenck, Associate Justices.

In the Matter of the Claim for Benefits under Article 18 of the Labor Law, made by Mike Cassaretakis, Claimant,

Frieda C. Miller, as Industrial Commissioner, Appellant,

Standard Dredging Corporation, Employer-Respondent

Appellant above named having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division, Third Department, entered in the office of the Clerk of said Court on the 1st day of December, 1941, unanimously reversing the decision of the Unemployment Insurance Appeal Board of the New York State Department of Labor, dated the 3rd day of March, 1941, with costs against the Industrial Commissioner; and the said appeal having been argued at the Court of Appeals by John

J. Bennett, Jr., Attorney General, Henry Epstein, Solici-
[fol. 168] tor General for Appellant; and by Kirlin Campbell Hickox Keating & McGrann, by H. Maurice Fridlund, Esq. of Counsel, for the Respondent; and after due deliberation of the Court of Appeals having rendered a decision and opinion herein and having ordered that the said order so appealed from be reversed and the determination of the Unemployment Insurance Appeal Board be affirmed with costs in this Court and in the Appellate Division and having further ordered that the matter be remitted to the Appellate Division of the Supreme Court, Third Department, there to be proceeded upon according to law; and the Remittitur from the said Court of Appeals having been filed herein.

Now, upon motion of John J. Bennett, Jr., Attorney General, Attorney for the Industrial Commissioner, it is hereby

Ordered that the order of the said Court of Appeals be and the same hereby is made the order of this Court, and it is further

Ordered that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and determination of the Unemployment Insurance Appeal Board be affirmed with costs in this Court and in the Appellate Division.

(S.) John S. Herrick, Clerk, by Clyde Booker, Deputy Clerk. (Seal.)

Ent. 10/22/42.

[fol. 169] Supreme Court of the United States

In the Matter of the Claim for Benefits under Article 18 of the Labor Law Made by Mike Cassaretakis, Claimant,

Standard Dredging Corporation, Employer, Appellant,

Frieda S. Miller, Industrial Commissioner, Appellee

Order Allowing Appeal—January 6, 1943

The petition of Standard Dredging Corporation, the appellant in the above entitled cause, for an appeal in the above case to the Supreme Court of the United States from a final order of the Court of Appeals of the State of New York, dated October 15, 1942, reversing an order of the

Appellate Division of the Supreme Court of the State of New York, Third Department, entered on the 10th day of November, 1941, having been filed with the Clerk of this Court and presented herein, accompanied by assignment of errors and prayer for reversal, and statement as to jurisdiction, all as provided by the Rules of the Supreme Court [fol. 170] of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York, dated October 15, 1942, reversing an order of the Appellate Division of the Supreme Court of the State of New York, Third Department, entered on the 10th day of November, 1941, as prayed for in said petition, and that the Clerk of said Appellate Division of the Supreme Court of the State of New York shall, within forty days from this date, make and transmit to the Supreme Court of the United States under his hand and the seal of said Court a true copy of the material parts of the record herein which shall be designated by praecipe or stipulation of the parties, or their counsel herein, all in accordance with the Rules of the Supreme Court of the United States.

It Is Further Ordered that the said appellant shall give a good and sufficient bond in the sum of $250.00, that said appellant shall prosecute said appeal to effect and answer all costs if he fail to make his plea good, and that said bond, when filed and approved, shall stay the sending down of the mandate herein and all proceedings in this cause until [fol. 171] the final disposition of this cause by the Supreme Court of the United States.

Dated January 6, 1943.

(Signed) Irving Lehman, Chief Judge of the Court of Appeals, State of New York.

[fol. 172] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—December 30, 1942

To the Chief Judge of the Court of Appeals of the State of New York:

Your petitioner, Standard Dredging Corporation, respectfully shows:

1. Petitioner is a corporation organized and existing under the laws of the State of New York and is the appellant in the above entitled cause.

2. The petitioner employed Mike Cassaretakis, the claimant herein, during the period from March 15th to August 17th, 1939, first as a cook's helper and later as a night cook aboard one of petitioner's dredges then operating on the [fol. 173] navigable waters of Gravesend Bay, New York Harbor, adjacent to the Borough of Brooklyn, New York City, pursuant to a permit issued by the United States Engineers Office, War Department. The dredge upon which the claimant was so employed was a hy*rd*aulic suction derdge documented as a vessel of the United States.

3. This cause originated by the filing by claimant with the Division of Placement and Unemployment Insurance, New York State Labor Department, of a request for a hearing to determine whether the claimant's employment by the petitioner was covered by the New York Unemployment Insurance law, thus requiring the petitioner to make contributions to the New York unemployment insurance fund based upon the wages paid to claimant.

4. After a hearing before one of the Referees appointed for that purpose by the New York State Industrial Commissioner, the Referee rendered a decision holding, contrary to the contentions of the petitioner, that claimant was not a member of the crew of a vessel operating on the navigable waters of the United States; that there was no constitutional prohibition against the coverage by the New York Unemployment Insurance Law of maritime employment; that said law did cover such employment; and that the petitioner was liable for contributions based upon the [fol. 174] wages paid to the claimant.

5. The petitioner thereupon appealed from the Referee's decision to the New York Unemployment Insurance Appeal Board specifying as the grounds for such appeal, among others, that the claimant was employed as a member of the crew of a vessel, documented under the laws of the United States, on navigable waters of the United States; that the claimant's employment was maritime in nature and therefore subject to the exclusive jurisdiction of the Federal Government; that such employment was not covered by the New York Unemployment Insurance Law; and that, if such employment was intended to be so covered, the said law was unconstitutional and void.

6. On March 3, 1941, the Unemployment Insurance Appeal Board rendered a decision which affirmed the decision of the Referee and adopted as its own the Referee's findings of fact and conclusions of law.

7. On appeal by the petitioner, the Appellate Division of the New York Supreme Court, Third Department, reversed the decision of the Appeal Board. In its memorandum decision the Court said:

"Clearly, claimant, a cook, was a member of the crew of a documented vessel operating on navigable waters. The dredge was licensed and enrolled as a vessel of the United States. Accordingly, claimant is not subject to the juris- [fol. 175] diction of the Unemployment Insurance Law but is subject solely in respect of the matter in controversy here to the admiralty and maritime jurisdiction of the United States. (Article III, Sec. 2, Constitution of the United States.)

"The grant of admiralty jurisdiction of the federal government was intended to commit direct control and to relieve maritime commerce of unnecessary burdens by reason of discordant legislation of the several states. (Knickerbocker Ice Co. v. Stewart, 253 U. S. 149.)"

8. On appeal by the Industrial Commissioner, the appellee herein, the Court of Appeals, by order dated October 15, 1942, reversed the order entered on the decision of the Appellate Division, Third Department, and held (1) that there is no constitutional objection to the coverage of maritime employment by the New York Unemployment Insurance Law; (2) that Congress did not exclude maritime employments from coverage by State unemployment insurance

by the enactment of Section 1607 (c)(4) of the Internal Revenue Code, which excludes from the coverage of the Federal Social Security Act, officers and members of the crew of a vessel on the navigable waters of the United States; and (3) that the determination of the Unemployment Insurance Appeal Board that the claimant was not a member of the crew of a vessel on the navigable waters of the United States involved solely a question of fact which, being supported in the record by substantial evidence, was conclusive upon the courts. In accordance with such decision and upon the coming down of the remittitur [fol. 176] from the Court of Appeals, an order was entered and filed in the office of the Clerk of the Appellate Division, Third Department, on October 22, 1942, reversing the order theretofore entered on the decision of said Appellate Division.

9. The Court of Appeals is the highest court of the State of New York in which a decision herein can be had.

10. In this cause there is drawn in question the validity of a statute of New York State on the ground that said statute, as here applied, is repugnant to the Constitution and laws of the United States, and the decision is in favor of its validity, notwithstanding your petitioner's contention that said statute, as here applied, violates Section 2 of Article III of the Constitution of the United States.

11. Therefore, in accordance with § 237 (a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this Court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to wit, under § 237 (a) of the Judicial Code, a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the [fol. 177] Rules of the Supreme Court of the United States; and there are likewise filed herewith statements as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the said Court of Appeals of the State of New York, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the final order of the said Court of Appeals reversing the order of the Appellate Division of the Supreme Court of the State of New York, Third Department, entered on the 10th day of November, 1941, may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Appellate Division of the Supreme Court of the State of New York, Third Department, under his hand and the seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioner, and that the cost bond tendered by the petitioner be approved and that the said appeal may operate as a supersedeas.

Dated December 30, 1942.

H. Maurice Fridlund, Attorney for Petitioner.

[fol. 178] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENTS OF ERROR—December 30, 1942

The petitioner assigns the following errors in the record and proceedings in this cause:

1. The Court of Appeals of the State of New York erred in holding that the New York Unemployment Insurance Law, New York Labor Law, Article 18 (Consolidated Laws, Chapter 31), when applied to maritime employment, is valid and does not violate the provisions of Article III, Section 2, of the Constitution of the United States.

2. The said Court erred in holding that the Congress of the United States had not excluded maritime employment [fol. 179] from coverage by State unemployment insurance by the enactment of Section 1607 (c)(4) of the Internal Revenue Code and thereby rendering the New York Unemployment Insurance Law, when applied to maritime em-

ployment, invalid and violative of Article III, Section 2 of the Constitution of the United States.

3. The said Court erred in refusing to review the determination of the New York Unemployment Insurance Appeal Board that claimant, a cook aboard a dredge documented under the laws of the United States and operating on navigable waters, was not a member of the crew of a vessel.

4. The said Court erred in failing to hold, as a matter of law, that claimant, a cook aboard a dredge documented under the laws of the United States operating on navigable waters, was a member of the crew of a vessel.

Wherefore, on account of the errors hereinbefore assigned, appellant prays that the said order of the Court of Appeals of the State of New York and the order of the Appellate Division of the Supreme Court of the State of New York, Third Department, entered on the remittitur from the Court of Appeals, on October 22, 1942, be reversed and an order directed to be entered in favor of the appellant.

Dated December 30, 1942.

H. Maurice Fridlund, Attorney for Appellant.

[fols. 180-181] Citation, in usual form, showing service on Mike Cassaretakis omitted in printing.

[fols. 182-183] Cost Bond on Appeal for $250.00, approved, omitted in printing.

[fol. 184] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR RECORD—February 1, 1943

To the Clerk of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department:

You are hereby requested to make a transcript of the record herein to be transmitted to the Supreme Court of the United States pursuant to the order of the Chief Judge of

the Court of Appeals of the State of New York, dated January 6, 1943, in the above mentioned cause and to include in such transcript:

1. The papers and records as shown in the return and transcript on file in the Appellate Division of the Supreme [fol. 185] Court of the State of New York, Third Judicial Department, making the order and judgment of the Court of Appeals the judgment of said Appellate Division;

2. The papers filed in the office of the Clerk of said Court pursuant to the Rules of the Supreme Court of the United States.

Dated February 1, 1943.

H. Maurice Fridlund, Counsel for Appellant, 120 Broadway, New York, N. Y.

[fol. 186] AFFIDAVIT OF SERVICE OF PRAECIPE

JAMES J. CURRAN, being duly sworn, deposes and says:

That on the 1st day of February, 1943 I served the within Praecipe for Transcript of Record on Mike Cassaretakis, 264 West 25th Street, New York, N. Y., the claimant, and Nathaniel Goldstein, Attorney General of the State of New York, attorney for Industrial Commissioner of the State of New York, Albany, N. Y., through the Post Office, by depositing copies of said Praecipe for Transcript of Record, each properly enclosed in sealed postpaid wrappers, [fol. 187] directed to said claimant and Attorney General at the addresses hereinbefore indicated, in a Post Office Box maintained by the United States Government at 120 Broadway, New York, N. Y.

James J. Curran.

Sworn to before me this 3rd day of February, 1943. (Seal) William A. Sheehan, Notary Public, Kings County, Kings Co. Clk. No. 616, New York Co. Clk. No. 1924. Commission expires March 30, 1944.

[fols. 188-189] Clerk's Certificate to foregoing transcript omitted in printing

[fols. 190-192] SUPREME COURT OF THE UNITED STATES

In the Matter of the Claim for Benefits Under Article 18 of the Labor Law, Made by MIKE CASSARETAKIS, Claimant,

STANDARD DREDGING CORPORATION, Employer, Appellant,

FRED S. MILLER, Industrial Commissioner, Appellee

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—February 11, 1942

Comes now the appellant, Standard Dredging Corporation, and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record as filed is necessary for the consideration of the case.

Dated, February 6, 1943.

H. Maurice Fridlund, Counsel for Standard Dredging Corporation, Appellant, Office and P. O. Address, 120 Broadway, New York, N. Y.

[fol. 192a] [Endorsed:] Supreme Court of the United States In the Matter of The Claim for Benefits under Article 18 of the Labor Law, made by Mike Cassaretakis, Claimant, Standard Dredging Corporation, Employer, Appellant, Frieda S. Miller, Industrial Commissioner, Appellee, Statement of points to be relied upon and designation as to printing record. H. Maurice Fridlung, Attorneys for Appellant, Kirlin Campbell Hickox Keating & McGrann, 120 Broadway, New York, N. Y.

[fol. 193] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. 722

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—March 8, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The Solicitor General is requested to file a

brief as amicus curiae and to participate in the oral argument if he so desires.

Endorsed on Cover: File No. 47, 223, New York, Supreme Court, Term No. 722, Standard Dredging Corporation, Appellant, vs. Frieda S. Miller, as Industrial Commissioner of the State of New York, and Mike Cassaretakis. Filed February 11, 1943. Term No. 722 O. T. 1942.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 722

STANDARD DREDGING CORPORATION, EMPLOYER,
Appellant,

vs.

FRIEDA S. MILLER, INDUSTRIAL COMMISSIONER, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

H. MAURICE FRIDLUND,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 722

STANDARD DREDGING CORPORATION, EMPLOYER, *Appellant,*

vs.

FRIEDA S. MILLER, INDUSTRIAL COMMISSIONER; MIKE CASSARETAKIS

JURISDICTIONAL STATEMENT PURSUANT TO RULE 12 OF THE RULES OF THE UNITED STATES SUPREME COURT.

I.

The Supreme Court of the United States has jurisdiction to review on appeal the final order here in question, under Section 237 (a) of the Judicial Code (28 U. S. C. A. 344), by reason of the fact that there is here drawn in question the validity of the New York Unemployment Insurance Law, Labor Law, Article 18 (Chapter 31 of the New York Consolidated Laws), on the ground that said statute, as applied to maritime employment, is repugnant to Article III, Section 2 of the Constitution of the United States and the

decision herein of the State Court is in favor of its validity as so applied.

The New York Unemployment Insurance Law provides for the establishment of a fund, which is administered by the State Industrial Commissioner, for the payment of benefits to qualified employees upon becoming unemployed. Contributions to such fund are obtained by the State through a levy upon employers measured by a percentage of the payroll and is assessed upon all employers generally with certain exceptions not here material. The law does not expressly except from its coverage maritime employment. In this cause, it has been held to apply to such employment.

The final order of the Court of Appeals of the State of New York sought to be reviewed herein was made on the 15th of October, 1942, and the remittitur of said Court of Appeals was filed in the Appellate Division of the Supreme Court of the State of New York, Third Department, on October 22, 1942.

The application for appeal in support of which this statement is made was presented on December 30, 1942.

II.

This case involves the authority of the State of New York to bring maritime employment within the coverage of its Unemployment Insurance Law in violation of Article III, Section 2 of the Constitution of the United States.

The attempt by a State to apply a statute, otherwise valid, beyond the proper jurisdiction of the State under the Constitution of the United States, to that extent draws in question the validity of such statute and a final judgment or decree of the State court may properly be reviewed on appeal by the Supreme Court of the United States. *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94.

III.

The Questions Here Involved Are Substantial.

Prior to the decision of the Court of Appeals in this case and certain companion cases decided by that court at the same time, every State in the Union had exempted officers and members of crews of vessels on navigable waters, 45 by specific statutory exemption, and the other 3 (including New York) by administrative ruling. In New York State, the Attorney General rendered an opinion in 1936 which held that the New York Unemployment Insurance Law could not be constitutionally applied to members of a crew of a documented vessel on the authority of the cases of *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, and *State of Washington* v. *Dawson*, 264 U. S. 219.

Thus it appears that heretofore the several States have voluntarily and unanimously recognized that the essential uniformity of maritime law would be invaded if State unemployment insurance laws were applied to maritime employment.

The question here involved necessarily affects the entire field of maritime operations.

If the final order of the State Court herein is sustained, employers who have been engaged in maritime operations within the territorial jurisdiction of the State of New York will be liable for contributions to the New York unemployment insurance fund, not only in the future but also for the period of approximately seven years since the enactment of the New York Unemployment Insurance Law, in addition to interest and penalties for having failed to make such contributions.

Employees engaged in maritime employment are vitally affected by the questions here involved, for if the United States Supreme Court on review of the appeal herein

should determine that there is no constitutional prohibition against the coverage of maritime employment under State unemployment insurance laws, the several States will undoubtedly amend their laws to cover such employment, with the result that maritime employees will be entitled to receive unemployment benefits under such laws.

A further question of considerable importance to the maritime field is here involved, namely, whether a person, such as the claimant herein, concededly employed as a cook aboard a dredge documented under the laws of the United States, is a member of the crew of a vessel. The New York Court of Appeals has here held, contrary to well established precedent, that this question is one of fact and not of law. That a cook aboard a documented vessel is a member of the crew as a matter of law has been heretofore well recognized.

Maryland Casualty Co. v. *Lawson*, 94 F. (2d) 190;
The Marie, 49 Fed. 286;
The Yacht Revenge, 1940 AMC 510.

Furthermore, the Federal Courts have consistently held that dredges are "vessels" engaged in navigation, maritime transportation and commerce.

The Dredge Alabama, (D. C. Ala., 1884), 19 Fed. 544, aff'd (C. C. A. 5th) 22 Fed. 449, (holding a dredge to be a vessel engaged in and having direct relation to commerce and navigation);

Saylor v. *Taylor*, (C. C. A. 4th, 1896), 77 Fed. 476;

Ellis v. *United States*, (1907), 206 U. S. 246;

Warren & Arthur Smadbeck, Inc. v. *Helvering Contracting Corp.*, (C. C. A. 2nd, 1931), 50 F. (2d) 99, (dredge chartered to build new land with dredged material);

Kibadeaux v. *Standard Dredging Co.*, (C. C. A. 5th, 1936), 81 F. (2d) 670; cert. den. 299 U. S. 549, (modern hydraulic dredge pumping dredged material through pipe lines over pontoons to shore);

Maryland Casualty Co. v. *Lawson*, (C. C. A. 5th, 1938), 94 F. (2d) 190, 192;

Woods Bros. Construction Co. v. *Iowa Unempl. Comp. Div.*, (Feb. 11, 1941), 229 Iowa 1171, 296 N. W. 345 (barge).

The Supreme Court of the United States has on numerous occasions held that, in the absence of some controlling statute, which is the situation here, the general maritime law as accepted by the Federal Courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction.

The Lottawanna, 21 Wall. 558;
Butler v. *Boston & Savannah Steamship Co.*, 130 U. S. 527, 557;
Workman v. *New York City*, 179 U. S. 552;
Southern Pacific Co. v. *Jensen*, 244 U. S. 205, 215.

IV.

The Federal question sought to be reviewed on this appeal was raised in the first instance in connection with the hearing conducted by the Referee appointed by the Industrial Commissioner. In its brief submitted at the close of the hearing, the appellant argued that maritime employment was not covered by the New York Unemployment Insurance Law, but that if it did cover such employment it was unconstitutional and void. In support of this contention, appellant cited an official ruling rendered in 1936 to the New York State Labor Department by the New York Attorney

General (1936 Op. At. Gen. 268) which held that the New York Unemployment Insurance Law did not, and could not constitutionally, be applied to cover officers and members of the crew of a vessel documented under the laws of the United States operating within the geographical limits of the State of New York. Reliance was also placed by appellant on an earlier decision (Case 2552-40) of the New York Unemployment Insurance Appeal Board in which the Board stated:

> "It is the opinion of this Board that Congress, in enacting the exemption in the Social Security Act for officers and members of a crew of a vessel, asserted its exclusive jurisdiction over that group. The states thereby were divested of their jurisdiction to legislate with reference to officers and members of a crew of a vessel."

Upon appeal to the New York Unemployment Insurance Appeal Board from the decision of the Referee which held that the claimant's employment, even though maritime, was covered by the New York Unemployment Insurance Law (Record, pp. 9-15), the appellant specified as the grounds of its appeal, among others, (1) that claimant was employed as a member of the crew of a vessel, documented under the laws of the United States, on navigable waters of the United States, (2) that claimant's employment was maritime in nature and subject to the exclusive jurisdiction of the Federal Government, (3) that, in the exercise of said exclusive jurisdiction, the Federal Government exempted such employment from the provisions of the Social Security Act, (4) that such employment was not covered by the New York State Unemployment Insurance Law, and (5) that, if such employment was intended to be so covered, the law is unconstitutional and void (Record, pp. 8-9).

The Appeal Board rendered a decision which affirmed the decision of the Referee and adopted as its own the Referee's findings of fact and conclusions of law (Record, pp. 5-6).

The employer, appellant here, appealed to the Appellate Division of the Supreme Court of the State of New York, Third Department, from the decision of the Appeal Board, and from each and every part thereof (Record, p. 3).

The Appellate Division, in a memorandum decision (Record, pp. 153-154), reversed the decision of the Appeal Board and stated:

> "Clearly, claimant, a cook, was a member of the crew of a documented vessel operating on navigable waters. The dredge was licensed and enrolled as a vessel of the United States. Accordingly, claimant is not subject to the jurisdiction of the Unemployment Insurance Law but is subject solely in respect of the matter in controversy here to the admiralty and maritime jurisdiction of the United States (Article III, Section 2, Constitution of the United States).
>
> "The grant of admiralty jurisdiction to the Federal government was intended to commit direct control and to relieve maritime commerce of unnecessary burdens by reason of discordant legislation of the several states. (Knickerbocker Ice Co. v. Stewart, 253 U. S. 149.)"

In further support of its decision, the Appellate Division referred to the provisions of Section 907 (c)(3) of Title IX of the Federal Social Security Act (Section 1607 (c)(4), Internal Revenue Code) which expressly excepts from the term "employment" services performed as an officer or member of the crew of a vessel on the navigable waters of the United States (Record, p. 154).

The New York State Industrial Commissioner appealed to the Court of Appeals from the order entered on the decision of the Appellate Division (Record, p. 149).

In its decision rendered on October 15, 1942, the Court of Appeals reversed the order of the Appellate Division

and affirmed the determination of the Unemployment Insurance Appeal Board. Thereafter, the remittitur from the Court of Appeals, the order of reversal of that Court, was made the order of the Appellate Division, Third Department, by order entered herein on October 22, 1942.

In its decision, reported in 289 N. Y. 119, the Court of Appeals held:

(a) That whether claimant, concededly a cook aboard a documented dredge operating on the navigable waters of the United States, was a member of the crew of a vessel, was solely a question of fact.

(b) That there is no constitutional objection to the coverage of maritime employments by the New York Unemployment Insurance Law.

(c) That, while Congress has the constitutional right to exclude maritime employments from coverage by State unemployment insurance, it did not do so by the enactment of Section 1607 (c)(4) of the Internal Revenue Code which excludes from the coverage of the Federal Social Security Act, officers and members of the crew of a vessel on the navigable waters of the United States.

There are appended hereto copies of the opinion of the Court of Appeals, the memorandum decision of the Appellate Division of the New York Supreme Court, Third Department, and the opinions of the New York Unemployment Insurance Appeal Board and the Referee.

Conclusion.

This is a proper case for the allowance of an appeal to the Supreme Court of the United States.

H. Maurice Fridlund,
Counsel for Appellant.

APPENDIX "A".

In the Matter of the Claim of MIKE CASSARETAKIS.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, Appellant.
STANDARD DREDGING CORPORATION, Respondent.

In the Matter of the Claim of JOSEPH BERGEN.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, Appellant.
INTERNATIONAL ELEVATING COMPANY, Respondent.

In the Matter of the Claim of JAMEL SHEREDOS.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, Appellant.
LAKE TANKERS CORPORATION, Respondent.

In the Matter of the Claim of JAMES R. KNOWLSON.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, Appellant.
MATTON STEAMBOAT CO., INC., et al., Respondents.

In the Matter of the Claim of DAVID SCHEIN.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, Appellant.
FAIR WATER TRANSPORTATION CO., INC., Respondent.

In the Matter of the Claim of FRED A. SMITH.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, Appellant.
BEN FRANKLIN TRANSPORTATION CO., INC., Respondent.

Argued June 15, 1942; decided October 15, 1942.

Appeal, in the first and second above-entitled proceedings, from orders of the Appellate Division of the Supreme Court in the third judicial department, entered December 1, 1941, and December 10, 1941, respectively, which reversed decisions of the Unemployment Insurance Appeal Board

determining that the claimants in such proceedings worked in employments subject to the unemployment insurance law (Labor Law, art. 18; Cons. Laws, ch. 31) and were entitled to be credited with their earnings in such employments as a basis for unemployment insurance benefits.

Appeal, in each of the third, fourth, fifth and sixth above-entitled proceedings, by permission, from orders of the same Appellate Division, entered November 19, 1941, which unanimously affirmed decisions of the Unemployment Insurance Appeal Board determining that the claimant in each of such proceedings did not work in an employment subject to the unemployment insurance law (Labor Law, art. 18; Cons. Laws, ch. 31) and was not entitled to be credited with his earnings in such employment as a basis for unemployment insurance benefits.

John J. Bennett, Jr., Attorney-General (Henry Epstein, W. Gerard Ryan and Francis R. Curran of counsel), for appellant.

H. Maurice Fridlund and James Ragan Roberts, for Standard Dredging Corporation, respondent.

Jules Haberman, Arthur E. Goddard and Robert B. Lisle, for International Elevating Company, respondent.

Frank C. Mason and Edward L. P. O'Connor for Conners Marine Co., Inc., et al., respondents.

Edward K. Bachman for Lake Tankers Corporation, respondent.

No appearance for Fair Water Transportation Co., Inc., Respondent.

No appearance for Ben Franklin Transportation Co., Inc., Respondent.

FINCH, J.

These six appeals present the question whether the New York unemployment insurance law (Labor Law, art. 18; Cons. Laws, ch. 31) imposing a pay-roll tax upon all employers of four or more employees, without discrimination and without exception here material, is applicable to marine employments.

In four of the above cases the Unemployment Insurance Appeal Board has found that the claimants had been em-

ployed as members of the crews of vessels on the navigable waters of the United States and for that reason the Board held that they were not covered by the unemployment insurance law. In the two remaining cases (*Matter of Cassaretakis* and Matter of Bergen) the Board has found that the claimants, although engaged in marine employments, had not been employed as members of the crews of vessels on the navigable waters of the United States, and on this basis held that they were covered by the statute in question.

Upon appeal to the Appellate Division, the decision of the Board in the four cases first mentioned above was sustained. In the other two cases, however, the determinations were reversed upon the ground that, by reason of the admiralty clause of the Federal Constitution, the unemployment insurance statute may not be held applicable to maritime employments.

The definition of employment contained in the New York Act (Labor Law, §502) is admittedly sufficiently broad to cover all maritime employments, including service as an officer or member of a crew of a vessel upon navigable waters of the United States, provided the whole or greater part of such employment is performed within this State. The Federal statute (U. S. Code, tit. 26, §1607, subd. c), on the other hand, specifically excludes from the tax levied thereunder services rendered as officer or member of a crew of a vessel upon the navigable waters of the United States. Whether or not an individual is a member of a crew of a vessel on the navigable waters of the United States presents primarily a question of fact which turns generally on whether the individual serves the ship in her navigation. (South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 259.) In consequence the determination of the Appeal Board, if sustained by substantial evidence, is conclusive upon the courts. (Labor Law, art. 18, §534; *Matter of Morton*, 284 N. Y. 167.) Upon this record there is substantial evidence to sustain the findings of fact in this regard of the Appeal Board. As to the four claimants who were found to be members of the crews of vessels, Sheredos was a cook on a self-propelled vessel carrying petroleum between points in New York and New Jersey; Schein was an

attendant on a speed boat which transported passengers from a New York city pier to the World's Fair; Knowlson was second engineer on a tugboat; Smith was a fireman on a lighter. All were plainly members of crews of vessels. On the other hand, Cassaretakis was assistant cook on board a dredge which was employed in a land filling operation in connection with the construction of a public highway. Bergen was a grain-trimmer on a floating grain elevator, his work being in connection with transfer of grain from one barge to another for purposes of further transportation. The employment of these two latter claimants, therefore, may be deemed incidental to construction and stevedoring operations, respectively, rather than to navigation. In consequence, Cassaretakis and Bergen, although concededly engaged in general maritime employment, were not members of crews of vessels on the navigable waters of the United States. These two claimants have, moreover, been found to be engaged in employment the whole or greater part of which was transacted within this State.

Two questions of law are raised, (1) whether there is constitutional objection to the application of the statute in question to maritime employments generally, and (2) if there is no such constitutional objection, whether the Congress preempted that part of the field relating to navigation by enacting a statutory prohibition against coverage by the State law, of officers and members of the crew of a vessel on the navigable waters of the United States.

In order to induce the several States to enact unemployment insurance statutes, the Federal government, by the Federal Unemployment Tax Act (Internal Revenue Code, U. S. Code, tit. 26, §§1600, 1601) levied a pay-roll tax upon employers, with certain exceptions, but allowed a credit up to ninety per cent of the Federal pay-roll tax to employers on account of contributions paid for State unemployment insurance. On its part the State of New York has levied a pay-roll tax upon employers measured by a percentage of the pay-roll and assessed upon all employers generally without regard to the nature of employment, with certain exceptions not here material (Labor Law, art. 18, §§ 515, 516). Neither the National nor the State govern-

ment contributes anything to the fund. The moneys collected by means of this tax are used for the relief of the unemployed, concededly an object within the powers of the State. (*Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495.)

This tax is an excise based upon the exercise of the privilege of employing individuals. (*Steward Machine Co. v. Davis*, 301 U. S. 548, 578-583; *Carmichael v. Southern Coal & Coke Co., supra; Patton v. Brady*, 184 U. S. 608.) The obligations of the employer under this law are not to his employees but to the State. Likewise, claimants of benefits assert their rights against the State and not against the employer. The employer's duty to pay contributions and the employee's right to receive benefits are independent of each other. The employer must continue to pay the tax although none of his employees ever becomes entitled to benefits through lack of employment; the employee has a right to receive benefits upon becoming unemployed although his employer has failed to contribute.

A mere statement of this State law demonstrates that it does not modify or attempt to modify, alter or supplement the rights and liabilities of the parties to any maritime contract, nor does it, touch remedies enforceable in admiralty. This tax exists independently of the employment out of which it arises. The measure of the tax by the amount of wages paid does not make the tax less independent of the occupation. Conceding that these claimants performed services under a maritime contract of employment, nothing in the challenged statute in any way changes, modifies or affects the reciprocal rights and duties of the employer and employee arising out of the maritime contracts or the remedies enforceable in admiralty. There is a fundamental distinction between statutes which interfere with the rights and obligations of the parties to a maritime contract, as between themselves, and a statute which effects no such interference.

The power to levy such an excise tax and to use the funds thus raised for local purposes is a sovereign power reserved to the States, of which they were not deprived by the Constitution of the United States. In *Carmichael v.*

Southern Coal & Coke Co., Mr. Justice Stone (now chief justice) said: "Taxes * * * may likewise be laid on the exercise of personal rights and privileges. As has been pointed out by the opinion in the *Chas. C. Steward Machine Co.*, case, such levies, including taxes on the exercise of the right to employ or to be employed, were known in England and the Colonies before the adoption of the Constitution, and must be taken to be embraced within the wide range of choice of subjects of taxation, which was an attribute of the sovereign power of the States at the time of the adoption of the Constitution, and which was reserved to them by that instrument." (P. 508.)

It is contended, however, that the State may not thus exercise its reserved powers of taxation because it involves a conflict with paramount powers vested in the Federal government in two respects; first, the State law is alleged to interfere with and burden maritime commerce in its national and international aspects as to which Congress alone has power to legislate; second, the State law is also alleged to contravene the essential purposes of and to work prejudice to characteristic features of the maritime law, and to interfere with its proper harmony and uniformity in its interstate and international relations.

The paramount power of Congress to legislate in the field of maritime law is implied from the grant to the Federal courts in section 2 of article III of the Federal Constitution, of judicial power in all cases involving admiralty and maritime jurisdiction. It is, however, well settled that in the maritime field, just as in the field of interstate commerce generally, the state has power to act in matters of merely local concern, which do not require uniform national legislation. (Cooley *v.* Board of Wardens, 12 How. [U. S.] 299.) One engaged in an interstate business may be lawfully subjected to a state tax upon the instruments employed in that business (Western Union Telegraph Co. *v.* Attorney-General, 125 U. S. 530), and this is so even though such commerce is maritime in nature (Old Dominion S. S. Co. *v.* Virginia, 198 U. S. 299, 305.)

In addition, by section 1606, subd. (a) of the Federal Tax Act, the Congress has declared that state unemployment insurance laws may be applied to interstate commerce.

And in Perkins *v.* Pennsylvania, 314 U. S. 586; affg., 342 Penn. St. 529, the Supreme Court has held that there is no constitutional obstacle under the commerce clause to the application of the Pennsylvania unemployment insurance law to those employed in interstate commerce. This would seem to be a conclusive determination that unemployment among those engaged in interstate commerce in general is a matter of local concern as to which no uniform national legislation is needed and in which field, therefore, the states may constitutionally legislate.

As to the second objection noted above and based upon the limitations upon state legislation stated in Southern Pacific Co. *v.* Jensen (244 U. S. 205) it would seem to be a sufficient answer to repeat that the enactment in question is a taxing statute designed to raise funds for a state purpose. It does not, therefore, attempt to alter the contract of employment between master and servant or to change the rights and remedies enforceable in admiralty as incidental to that relationship. It does not create any new rights or liabilities between the parties. Nothing contained therein would cause a court of admiralty to alter in any respect the body of law which it applies to the cases pending before it.

That a state may, within prescribed limits, enter into the field of maritime law and add to or modify remedies enforceable in admiralty was conceded by Mr. Justice McReynolds in the Jensen case. In Just v. Chambers (312 U. S. 383) a statute of the State of Florida, providing that a cause of action for personal injuries shall survive the death of the tort feasor, was held to be applicable in a court of admiralty to an action against the owner of a vessel on account of injuries occurring on navigable waters within the State boundaries. The State law, it was said, did not offend the criteria of essential purpose and uniformity laid down in the Jensen case. If, therefore, the states may, within the prescribed limits, actually add to the remedies under maritime law, a fortiori, the legislation in the case at bar may not be held to have overridden the limitations set forth in the Jensen case.

Respondents point to a line of authorities (Southern Pacific v. Jense, supra; Knickerbocker Ice Co. v. Stewart, 253

U. S. 149; Western Fuel Co. v. Garcia, 257 U. S. 233; Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469) holding workmen's compensation statutes invalid as interfering with the characteristic features and essential uniformity of admiralty law. These cases all rest upon the principle that the workmen's compensation laws set aside the common law rules respecting the rights and liabilities of employer and employee and substituted new rules for determining such rights and liabilities. These statutes become a part of the contract and thereby directly affect the rights and duties between the parties. As was said by this court in Matter of Doey v. Howland Co. (224 N. Y. 30, 36): "An award under the Workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract. (Matter of Post v. Burger & Gohlke, 216 N. Y. 544.) The contract of employment, by virtue of the statute contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for injuries sustained, or if death results, a certain sum to dependents."

A clear distinction between these cases and that of the unemployment insurance law is that the latter does not in any way operate upon the contract of employment or interfere with maritime and admiralty jurisdiction. The payment of an excise tax upon the privilege of employing others can no more be considered an unwarranted intrusion by the states into admiralty jurisdiction than can numerous other state taxes previously upheld; for instance, franchise taxes upon towing companies (People ex rel. Cornell Steamboat Co. v. Sohmer, 235 U. S. 549); taxation of insurance companies upon the writing of marine insurance policies (Ætna Ins. Co. v. Houston Oil & Transport Co., 49 Fed. Rep. [2d] 121); taxes upon shipping (Transportation Co. v. Wheeling, 99 U. S. 273); and tolls levied upon interstate and foreign shipping using state-improved waterways. (Sands v. Manistre River Improvement Co., 123 U. S. 288.)

It follows that there is no constitutional objection to coverage of maritime employments by the Unemployment Insurance Act of New York State.

We are thus brought to the second question, namely, whether by virtue of the provisions of section 1607 (subd. c) (par. 4) of the Internal Revenue Code (U. S. Code, tit. 26) the officers and members of the crew of a vessel on the navigable waters of the United States have been specifically excluded by Congress from coverage by state laws. We may assume that Congress has the constitutional right under the admiralty clause of the Federal Constitution, to exclude maritime employments from coverage by state unemployment insurance.

In other words does the fact that the Federal Act in the case at bar exempts from its operation the officers and crews of vessels on navigable waters prevent the states from covering maritime employment in the unemployment insurance laws which they have enacted?

From the nature of the independent power reserved to the states of taxing for their own support and to promote the general welfare of their inhabitants, there has been developed the principle that it will not be presumed that Congress intended to exclude the reserved powers of the state by virtue of paramount powers vested in Congress by the Federal Constitution unless an actual conflict exists between Federal and State legislation. In Savage v. Jones (225 U. S. 501) the court lays down this principle (at p. 533): "But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State."

A comparison of the Federal tax act and our State unemployment insurance act shows that there is no actual conflict between them even when the State act is construed to cover employments expressly exempted under the Federal taxing statute.

The Federal statute, of course, is not an unemployment insurance law. It is a mere taxing statute but contains a provision allowing ninety per cent of contributions exacted thereunder to be credited by employers against contributions enacted thereunder to be credited by employers against

contributions paid under certified state systems. This credit arrangement was designed to give the states an incentive to enact their own unemployment insurance laws and to protect those states which enacted such laws against being put at a competitive disadvantage as against other states which might fail to take such action. Congress evidently believed that these objects could be accomplished by taking only certain kinds of employment while exempting other kinds. The states in creating their unemployment systems, on the other hand, had different objectives in view in canvassing the kinds of employment to be covered or excluded under their statutes. Their problem was to decide what types of employment seriously required the protection of an unemployment compensation law and what types could practically be included within such a system. Whatever types of employment the Congress might exclude, the states might exempt wholly different types upon the ground that employees in these categories did not require such protection or else that it would be impracticable or impolitic to furnish them with such protection. There is, therefore, no necessary similarity as to the types of employment either covered or exempted by the Federal and state statutes respectively.

The legislative history and the judicial interpretation of the Federal statute amply demonstrate that it was not intended thereby to strait-jacket the states in the enactment of their own unemployment insurance laws. (See Senate Report, No. 628, Cal. No. 661, 74th Congress, p. 14; Steward Machine Co. v. Davis, supra, at pp. 593, 594.) The conclusion is inescapable that Congress intended to leave to the states the widest possible latitude in setting up their unemployment compensation systems both as to the kind and extent of coverage provided. This broad policy may not be overriden by the exemptions contained in section 1607 (subd. c) (par. 4).

One word should be said in conclusion as to the argument advanced that great practical difficulties lie in the way of the states providing benefits for seamen, the nature of whose work may take them into many other states and even into foreign parts. A picture is drawn of the hopeless confusion into which maritime employment may be plunged if

a number of states attempted to apply conflicting state statutes to the same employer-employee relationship. The difficulty conjured up would appear to be more imaginary than real and in no event could affect the result arrived at herein. It may be that Congress will in future decide to appropriate the entire marine field to a uniform unemployment insurance system. Such congressional action might effectively oust the states from the field because of the paramount power vested in Congress by section 2 of article III of the Federal Constitution. It is sufficient for the purpose of these appeals, however, to say that no such obstacle stands in the way of state legislation at the present time.

It follows that in the cases of the claimants, Cassaretakis and Bergen, the orders of the Appellate Division should be reversed and the determination of the Unemployment Insurance Appeal Board affirmed; in the cases involving Sheredos, Knowlson, Schein and Smith, the orders of the Appellate Division and the determination of the Unemployment Insurance Appeal Board should be reversed and the cases remitted to such Appeal Board for proceedings in accordance with this opinion, all with costs in this court and in the Appellate Division.

Lehman, Ch. J., Loughran, Rippey, Lewis, Conway and Desmond, JJ., concur.

Ordered accordingly.

APPENDIX "B".

SUPREME COURT, APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

Decision handed down Nov. 19, 1941.

395-5

In the Matter of The Claim for Benefits under Article 18 of the Labor Law made by MIKE CASSARETAKIS, *Claimant*,

STANDARD DREDGING CORPORATION, *Appellant*,

FRIEDA S. MILLER, as Industrial Commissioner, *Respondent*.

Appeal by employer-appellant from a decision of the Unemployment Insurance Appeal Board, which held that the New York Unemployment Insurance Law covered the services of the claimant as a cook and cook's helper aboard employer-appellant's dredge.

Claimant was employed by appellant first as a cook's helper and later as a cook aboard a hydraulic suction dredge documented as a vessel of the United States. His duties consisted of preparing meals, waiting on tables and cleaning up the kitchen and dining room. He ate his meals on board the dredge and customarily slept there. The dredge on which he was employed was operating on navigable waters of the state.

Clearly, claimant, a cook, was a member of the crew of a documented vessel operating on navigable waters. The dredge was licensed and enrolled as a vessel of the United States. Accordingly, claimant is not subject to the jurisdiction of the Unemployment Insurance Law but is subject solely in respect of the matter in controversy here to the admiralty and maritime jurisdiction of the United States. (Article III, Section 2, Constitution of the United State...)

The grant of admiralty jurisdiction to the federal government was intended to commit direct control and to relieve maritime commerce of unnecessary burdens by reason

of discordant legislation of the several states. (Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149.)

The Social Security Act specifically excepts from the term employment "services performed as an officer or member of the crew of a vessel on the navigable waters of the United States." (Section 1607 (c) (4) Internal Revenue Code. See also Matter of Bergen *v.* Miller, Industrial Commissioner, decided by this court November, 1941.)

Decision of the Unemployment Insurance Appeal Board should be reversed.

Decision of the Unemployment Insurance Appeal Board reversed, with costs to appellant.

Hill, P. J., Crapser, Bliss, Hefferman and Schenck, JJ., concur.

APPENDIX "C".

(Matter of Claim of Mike Cassaretakis)

DECISION OF APPEAL BOARD IN CASE NO. 4014-40.

STATE OF NEW YORK,
Department of Labor,
Unemployment Insurance Appeal Board:

Re: Name 511-314-40R.

S. S. No.—— Employer No. ——

The employer appeals from the decision of the referee dated October 9, 1940 holding that the claimant worked in covered employment and is entitled to be credited with his earnings with said appellant.

Hearings were held before the referee at which all parties appeared and were accorded full opportunity to be heard. Briefs submitted on behalf of the Industrial Commissioner and the employer have been considered by the Board.

After a careful review of the record, testimony and evidence adduced before the referee, and due deliberation having been had thereon, and having found that the referee's findings of fact and conclusions of law are fully supported

by the evidence in this case, and that no errors of fact or law appear to have been made, the Board adopts the findings of fact and the conclusions of law made by the referee as the findings of fact and conclusions of law of this Board.

Opinion:

The Board is of the opinion that the referee made proper findings of fact and correctly determined the issues involved in this case. This Board's recent opinion in Appeal Board No. 3604-40 is so applicable to the instant facts that we incorporate it herein by reference. Appeal Board No. 2552-40, relied on by the appellant, is not in point. The latter case involved a "vessel propelled by steam commissioned to carry petroleum products." In the instant case, the vessel involved is a non-self propelled dredge carrying neither cargo nor passengers.

Decision:

Claimant worked in covered employment within the meaning of the New York State Unemployment Insurance Law and is entitled to be credited with his earnings with the appellant as fixed by the reference.

The decision of the referee is affirmed.

Dated: March 3, 1941.

(S.) JOHN E. MCGARRY,
Member.

DECISION OF UNEMPLOYMENT INSURANCE APPEAL BOARD IN CASE NO. 3604-40 INCORPORATED BY REFERENCE IN APPEAL BOARD'S DECISION IN INSTANT CASE.

STATE OF NEW YORK,
Department of Labor,
Unemployment Insurance Appeal Board:

Re: Name ——. S. S. ——.

Decision Case No. 3604-40, 532-559-40R, 32-20-40R, 532-595-40R, 531-279-40R, 44-14-40R, 535-603-40R, 32-21-40R, 510-228-40R, 510-352-40R, 536-481-40R, 32-18-40R.

The employer appeals from the decision of the referee dated July 12, 1940, holding that eleven claimants and all

others similarly employed, worked in covered employment with the appellant and are entitled to be credited with their earnings in such employment.

Hearings were held before the referee at which representatives of the employer and some of the claimants appeared and testified. A further hearing was held before this Board at which representatives of the employer, the Industrial Commissioner and some of the claimants appeared and had full opportunity to be heard.

Based on the record and testimony in this case, the Board makes the following

Findings of Fact:

The employer is a Delaware corporation, licensed to do business in the State of New York, with its home office in Brooklyn, New York. It pays the New York State Franchise Tax and makes contributions under the Unemployment Insurance Law on those employees whose employment it concedes to be subject to the law.

During 1939, the employer was engaged in the performance of two contracts, one with the State of New York, the other one with the City of New York. Under its contract with the State of New York the employer was engaged in deepening the Barge Canal. For that purpose it employed a dredge known as the "Empire State". This dredge was built in 1912, is 138′ 5″ long, 40′ wide, 8′ 6″ deep and has a gross tonnage of 369 tons. During 1939, the dredge was operated entirely within the State of New York. It is equipped with a triple expansion steam engine for the operation of its pump, but this engine is not used to navigate the dredge. The dredge is not self-propelled and is not equipped with a rudder. It has lights and a steam whistle for signalling purposes. During 1939, the dredge was not documented.

The dredge operated on the so-called suction principle. The material on the bottom of the canal was sucked up by a pump and carried to the shore through pipe lines supported by floating pontoons. During operations the dredge was moved by means of swinging wires and spuds.

The crew of this dredge consisted of a "captain", operators, mates, deck hands, engineers, oilers, firemen and engine room helpers. There was also a carpenter, welder and welder's assistant. No licenses of any kind were required for these men.

In addition to the men who worked on board the dredge or on the pipe lines and floating pontoons, there was a shore crew working under the supervision of a foreman. The appellant's superintendent was in charge of both crews and was the superior of the "captain" and of the foreman. During the progress of this work, the men neither ate nor slept aboard, but went to and from the dredge by boats provided by the employer.

When the dredge was transported from Arverne, New York to its base of operations at the Canal, the employer provided food and sleeping quarters for its personnel on board.

Contributions were originally paid under the New York State Unemployment Insurance Law, but subsequently the employer claimed a credit for these payments, contending that the employment of the persons aboard the dredge was exempt from the provisions of the New York State Unemployment Insurance Law.

The contract with the City of New York provided for the creation of a fill for the Shore Parkway then under construction. As an incident to the creation of a fill, the contract with the City provided for the dredging of a channel in Jamaica Bay. The appellant used two dredges in the raising of the fill for the Shore Parkway, known as dredge No. 5 and dredge No. 2.

Dredge No. 5 was built in 1921 and is 155′ long, 43′ wide and 10′ 3″ deep. The main dredge pump is operated by a 3600 horse power steam turbine. In addition to the suction pump, this dredge has a cutter which loosens the material to be sucked up from the bottom of the Bay.

This dredge was towed along the sea coast at various times from job to job. During these trips it carried an anchor, life-boat, life-preservers, food supplies and had sleeping accommodations for its personnel on board. While the dredge was operating in Jamaica Bay, neither food nor

sleeping quarters were available to the men employed on the dredge. During these operations 42 men were employed on it. They consisted of a "captain", operators, mates, deck hands, a welder, engineers, oilers and firemen. During operations the dredge was able to move about eight feet at a time by means of spuds; otherwise it was not self-propelled. It was not documented during 1939. It was equipped with lights, fog bell and steam whistle for signalling. A "captain" was in charge of the dredge crew, a general foreman was in charge of a shore crew and a superintendent of the employer supervised both. The deck hands worked on the dredge, floating pontoons and sometimes on shore, spending about half of their time on the dredge. No licenses were required for any of the men aboard the dredge.

Dredge No. 2 was built in 1908. Its main pump was operated by a 500 horse power motor. It was not self-propelled, but could move slightly by means of a swinging wire. It had a suction pump only and was not equipped with a cutter. It had lights and a steam whistle for signalling purposes. This dredge was not documented during 1939. Dredge No. 2 complemented the operations of dredge No. 5 in Jamaica Bay. None of the members of the crew of dredge No. 2 were required to be licensed.

Four of the claimants herein were employed as deck hands, one as assistant engineer, three as oilers and three as firemen. Their services were rendered either on the dredges, pontoons or on the pipe lines resting on the pontoons. One of the firemen worked part of the time with the shore gang. There is no dispute as to the earnings of any of the claimants herein. The employer paid contributions under the Unemployment Insurance Law on the earnings of the persons employed in the shore gangs.

Opinion:

The sole issue on this appeal is whether or not the employment of the claimants herein in the dredging of the Barge Canal and Jamaica Bay was exempt under the provisions of the Unemployment Insurance Law.

Subject to the paramount right of the United States Government to regulate navigation, New York State retained its territorial jurisdiction over the two places where the employment of the claimants occurred (*The Lewis Blue Point Oyster Cultivation Co.* v. *Briggs*, 198 N. Y. 287, 291). Most of the contentions of the appellant herein have been raised and answered in our decision in Appeal Board No. 1180-39. We there said:

"The employer concedes that it is subject to the Unemployment Insurance Law with reference to those employees who are employed by it on land. It contends, however, that the Act can not apply to the claimant because claimant is engaged in a maritime pursuit which is subject to the exclusive jurisdiction of the United States Government.

"The state law in terms applies to all employees subject to a few enumerated exceptions. The employment of the claimant does not come within the exemptions therein stated. The Act, therefore, applies to the claimant, unless it is in conflict, insofar as the claimant is concerned, with some provisions of the State or Federal Constitution. The employer contends that so far as the claimant is concerned, the application of the Act to him would bring it in conflict with Article 3, Section 2 of the Federal Constitution which grants to the United States Government exclusive jurisdiction over admiralty and maritime matters. The appellant argues that the dredging and widening of the barge canal was a maritime undertaking subject to the exclusive jurisdiction of the Federal Government and may not be regulated or taxed by the State of New York.

"We may assume for the purposes of this decision that the claimant was engaged in work of a maritime nature. The question before us whether the imposition of the tax required by the Unemployment Insurance Law with reference to the claimant is an interference with the exclusive maritime jurisdiction of the United States. The appellant says it does and relies primarily on the following cases: Knickerbocker Ice Company vs. Steward, 253 U. S. 149; The Industrial Accident Commission of California vs. Rolf Company, 264 U. S. 219. Both of these cases deal with workmen's compensation acts. An examination of the

decision will reveal that the Court held that the workmen's compensation laws of the states involved alter the contract rights existing between the employer and employee and deprive the parties thereto of the right to litigate claims arising therefrom in the federal courts. It is because the action in effect deprives the parties to a maritime contract of their right to litigate claims arising from maritime employment in the United States Courts that these statutes were held to offend against the Constitution of the United States.

"It thus becomes necessary to examine into the provisions of the New York Act to discover whether its provisions alter either presently existing common law rights or create new ones with reference to maritime contracts. The cardinal provisions of the New York Unemployment Insurance Act is the imposition of a tax on employment. The nature of the tax imposed by the New York law is no different than that imposed by the provisions of Section 901 of the Social Security Act. It is also of the same kind as that imposed by the State of Alabama under its Unemployment Compensation Act.

"The Social Security Act of the United States has been passed upon by the United States Supreme Court in the case of Steward Machine Company vs. Davis, 301 U. S. 548. The provisions of the Alabama Unemployment Compensation Act were passed upon by the highest court of the State of Alabama in the case of Beeland Wholesale Company vs. Kaufman, 174 So. 516 and also by the United States Supreme Court in the case of Carmichael vs. Southern Coal & Coke Company, 301 U. S. 495.

"In the two cases above mentioned, the Steward Machine Company case and the Carmichael case, the United States Supreme Court held that the payroll tax imposed by Section 901 of the Social Security Act and the one imposed by the Alabama Unemployment Compensation Act were in the nature of an excise tax and constituted a valid exercise of the taxing powers of the United States and of the State of Alabama; that those acts do not offend against any provisions of the United States Constitution.

"Judge Cardozo in the Steward Machine Company case pointed out that the excise tax was known in the law both in this country and in England long before the adoption of the Federal Constitution and antedated it. The tax, while depending upon a status of employer-employee relationship and measured by the amount of the payroll, does not interfere with the basic relationship that exists between the parties. It creates no new rights and imposes no new liabilities. It does not give any right to the claimant as against the employer. The right to compensation created by the act is given against the State and not against the employer.

"The claim for unemployment insurance benefits is paid out of the State Fund and depends on many other factors besides work in covered employment. The appellant is not required to pay contributions in an amount sufficient to pay the claims of any of his employees. The extent of the employer's liability is merely the payment of a tax. As a matter of fact, claimant would receive his benefits even if the employer failed to pay the tax.

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"It is thus obvious that the imposition of the tax on the employer, although based upon the status of employer-employee relationship does not interfere with any contract rights the employer might have, while engaged in its maritime pursuit. It does not impose any unreasonable burdens on the employer and does not constitute an interference with the maritime jurisdiction of the United States. The grant of benefit rights to the claimant does not militate against the validity of the taxing act. As has been said by Judge Stone in the Carmichael case:

" ' "But if the tax, *qua* tax, be good, as we hold it is, and the purpose specified be one which would sustain a subsequent and separate appropriation made out of the general funds of the Treasury, neither is made invalid by being bound to the other in the same act of legislation." Cincinnati Soap Co. v. U. S., supra' (page 521)

"The mere fact that a certain matter be within the apparent jurisdiction of the United States does not *ipso*

facto divest the state of all legislative functions with reference to the matter. The state may legislate with reference to such matters within certain limitations.

"'It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the Union. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power. Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away.' U. S. v. Bevans, 3 Wheat. 356, 388.

"Within this exclusive maritime field there is also an area of proper state action. There are numerous cases where the exercise by the state of jurisdiction over maritime matters and interstate commerce have been sustained by the courts. This is particularly true with reference to subjects as to which Congress has failed to legislate. See Minnesota Rate Cases, 230 U. S. 352. Typical examples of state legislation with reference to maritime and interstate commerce matters are the following cases: Cooley vs. Board of Wardens, 12 How. 299, where a state law, which compels vessels to take a pilot and imposes a fee, has been sustained; Smith vs. Alabama, 124 U. S. 465, compelling locomotive engineers engaged in interstate commerce to be examined and licensed by state authorities; Nashville Chattanooga & St. Louis Railway v. Alabama, 128 U. S. 96, where locomotive engineers were required to be examined for defective eyesight; N. Y., N. H. & H. R. R. Co. v. N. Y., 165 U. S. 628, regulating the heating of passenger cars; Chicago, Milwaukee & St. Paul R. R. Co. v. Solan, 169 U. S. 133, prohibiting railroad companies from contracting away liability for torts. It is needless to multiply these examples. It is sufficient to say there is always a borderline area of subject matter over which both the United States Government and the state governments may properly exercise concurrent jurisdiction.

"Thus, conceding the maritime jurisdiction of the United States Government over the functions performed by claimant as a maritime matter, the State of New York has not

been deprived of all jurisdiction over the same subject matter. It is still exercising sovereign powers over the territory wherein the claimant was employed.

" 'The case in this relation falls within the principle of our decision in James vs. Dravo Contracting Company, supra. The question, we there said, was not one of the paramount authority of the Federal Government to have the work performed for the purposes within the federal province. The title to the bed of the river was in the State. And, although subject to the dominant right of the Federal Government, the servient title continued in the State which thus retained its territorial jurisdiction for purposes not inconsistent with the exercise by the Federal Government of its constitutional functions.' Atkinson v. Tax Commission, 303 U. S. 20, 22. See to the same effect the cases of Silas Mason Co. vs. Tax Commission, 302 U. S. 186; James vs. Dravo Contracting Company, 302 U. S. 134.

"At any rate the right of the state to impose an excise tax on activities which are within the scope of the Federal jurisdiction is not an open question any more. It has been passed upon by the United States Supreme Court in a number of cases. Its extent has been laid down by that Court in the case of Hump Hairpin Manufacturing Company vs. Emerson, 258 U. S. 290, 294:

" 'While a State may not use its taxing power to regulate or burden interstate commerce (citing cases), on the other hand, it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating federal constitutional rights.'

"The validity of a state tax on an instrument of maritime commerce has been sustained in the case of Old Dominion S.S. Company vs. Virginia, 198 U. S. 299, 305.

"Assuming the general validity of the State Unemployment Insurance Law as we must (see Chamberlain vs. Andrews, 271 N. U. 1), its application to the employment of the claimant does not offend against the Federal Constitution. It does not constitute an interference with the maritime jurisdiction of the United States.

"However, we do not intend to say that the imposition of the tax will be valid under all circumstances. We realize that its application to the claimant brings it into the sphere of normal Federal jurisdiction. The extent of that jurisdiction is not always defined. It is susceptible of extension both by judicial decisions of the Federal Courts and by action of Congress.

" 'The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history.' The Blackheath, 195 U. S. 361, 365.

"Should Congress act with reference to the subject matter of the legislation herein involved, we may concede that the state would be ousted of jurisdiction.

" 'But the authority of state laws or their administration may not interfere with the carrying out of a national purpose. Where enforcement of the state law would handicap efforts to carry out the plans of the United States, the state enactment must, of course, give way.' Stewart & Co., Inc. vs. S. Dracula, decided by the U. S. Supreme Court on January 29, 1940.

"A good illustration of this principle is found in the Railroad Unemployment Insurance Act (Approved June 25, 1938). Until the passage of that act the New York State Unemployment Insurance Act applied. The moment the United States Congress had passed the Railroad Unemployment Insurance Act, New York State was ousted from jurisdiction. Its application to railroad workers then became a nullity because it interfered with the federal objective. It required no state legislation to repeal the act in order to accomplish that purpose.

"Relying on this principle, the appellant argues that assuming the general validity of the New York Unemployment Insurance Act and its possible application to employment normally under federal jurisdiction, its application to maritime matters is a nullity because maritime activities have been expressly excepted by Federal legislation. The appellant relies on the provisions of Section 903 of the Social Security Act which grants exemption from taxation on the employment of officers and members of a crew of vessel. Differently stated, the appellant contends that the provision

just referred to constitutes legislation by the United States Congress with reference to unemployment insurance covering employment of a maritime nature; that this action has ousted all states of any jurisdiction over such employment.

"In determining the intent of the United States Congress in enacting Section 903 of the Social Security Act, other pertinent provisions must be taken into consideration. Congress did not create a Federal scheme of unemployment insurance benefits. The object of the national legislation was to encourage and invite the states to enact laws of their own which would complement federal legislation. In inviting the states to enact unemployment insurance acts, Congress has expressly provided that employment in interstate commerce shall not be a defense to the payment of any state tax. Thus it is apparent that Congress desired the states to cover fields which normally come within the United States jurisdiction. Employment in interstate commerce, as far as the United States is concerned, is not any different than employment of a maritime nature.

"It is therefore obvious that the only group that Congress excluded was one coming within the narrow definition of the phrase 'officers and members of a crew of a vessel.' This is a phrase of exclusion and should not be given a narrow construction. We are not altogether without guidance in the construction of the language used. Similar language has been used by the United States Congress in enacting a Workmen's Compensation Act covering harbor workers. In construing this language the United States Circuit Court of Appeals in the case of Diomede v. Lowe, 87 Fed. (2d) 296, at page 298, said:

" 'The crew is usually referred to and is naturally and primarily thought of as those who are on board and aiding in the navigation without reference to the nature of the arrangement under which they are on board.

• • • • • • •

" 'The rule In re O'Donnel, 26 F. (2d) 334 (C. C. A. 2), that the tug and barges together constitute one vessel under the Harbor Act (46 U. S. C. A. § 190-195), and all must therefore be seaworthy, has little bearing upon the question before us. Assuming that the flotilla were to be regarded

as a "vessel" within the meaning of the excepting clause, nevertheless the question whether the decedent was the member of a crew must be determined solely from the nature of the decedent's employment with relation to the scow upon which he worked.'

"Applying the test of this case to the claimant, it is apparent he does not come within the category of an officer or a member of a crew of a vessel as described in Section 903 of the Social Security Act. The dredge upon which claimant was employed was not engaged in navigation; it was not engaged in the transportation of passengers or freight. It had no officers in the accepted sense of the word, nor a crew within the same meaning. The operations of the dredge involved construction rather than navigation. It was intimately connected with and was part of land operations. The claimant worked under the supervision of a foreman and superintendent rather than an officer of a vessel.

• • • • • • •

"In deciding the question of conflict of jurisdiction between the United States and a state government it must be borne in mind that we are not dealing here with a conflict between alien powers; that cooperation between Federal and state authorities has been frequent and received the approval of the court. This is a case of such cooperative effort.

"As has been said by Judge Stone in the Carmichael case at page 526:

" 'The United States and the State of Alabama are not alien governments. They co-exist within the same territory. Unemployment within it is their common concern. Together the two statutes now before us embody a cooperative legislative effort by state and national governments for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other. The Constitution does not prohibit such co-operation.'

"We conclude that claimant worked in covered employment within the meaning of the Unemployment Insurance Law of the State of New York."

The foregoing opinion disposes of all the issues raised by the appellant, with a single exception. The exception relates to the argument of the appellant that in enacting the Social Security laws, Congress had no visible object in excepting seamen only and that the phrase "officers or members of a crew of a vessel" covers the entire maritime field which is within the exclusive Federal jurisdiction. It appears to us that there are many reasons which readily present themselves for the exclusion of seamen alone as distinguished from maritime workers generally from coverage under state laws. Seamen are hired and their employment is terminated not only throughout the many ports in the United States, but also in ports throughout the world. It may well have been contemplated that no state could set up administrative machinery to ascertain the period of unemployment of seamen laid off in foreign ports; nor would a state have facilities to offer such seamen reemployment as required by the provisions of the several State Unemployment Insurance Laws. These administrative difficulties are confined to seamen only whose duties take them all over the world.

Harbor workers, on the other hand, have a definite *locus* of operation and are usually confined within the territorial jurisdiction of the state involved. Dredge workers are within the same category as longshoremen, drydock workers and other harbor workers. In enacting the Social Security Law, Congress selected language used in the Longshoremen and Harbor Workers Act, which was intended to restrict its application to seamen only. The phrase "officers or members of a crew of a vessel," having such restricted meaning, was inserted into the Social Security Act and must be construed to exclude only the members of a narrow group whose employment it was not deemed feasible to cover under State Acts.

"The word 'crew' does not have an absolutely unvarying legal significance. • • • When the 'crew' of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they

are on board. South Chicago Coal & Dry Dock Co. et al. v. Bassett, 309 U. S. 251, 258 and 259."

An analysis of legislation by Congress on the subject of Social Security leads to the conclusion that the exception contained therein is intended to be limited to seamen only and not to all persons engaged in rendering services of a maritime nature. Section 811 (b) 5, Title VIII of the Social Security Act, formerly excepted from coverage under the old age provisions the following: "Service performed as an officer or member of the crew of a vessel documented under the laws of the United States or of any foreign country."

The taxing provisions of the old age portion of the Social Security Act are now contained in sub-chapter A of chapter 9 of the Internal Revenue Code. Section 1425 (b) now defines employment under the Act to include "(B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, * * *."

It is thus obvious from the above quoted provision, that seamen employed on American vessels are now covered under the old age provisions of the Social Security Act. If we were to adopt the contention of the appellant that the phrase "services performed as an officer or member of a crew of a vessel" excludes all maritime workers from coverage under Title VIII of the Social Security Act, we would have the anomaly that seamen in American vessels would be covered under Section 1426 (b) of the Internal Revenue Code for old age pensions, while dredge workers, drydock workers, longshoremen and all other harbor workers would be excluded under the same act. It is obvious that such contention is untenable.

We therefore conclude that persons employed on a dredge while engaged in dredging operations, are not officers or members of a crew of a vessel within the meaning of the Social Security Act and are not excluded from coverage under the New York State Unemployment Insurance Law.

Decision:

The claimants herein and all other persons similarly employed worked in covered employment and are entitled to be credited with their earnings in the amounts fixed by the referee.

The decision of the referee is affirmed.

Dated: February 20, 1941.

(s) JOHN E. MCGARRY,
Member.

APPENDIX "D".

Decision of Referee.

STATE OF NEW YORK

Department of Labor

Unemployment Insurance Referees' Unit

Claimant: Mike Cassaretakis.
Referee: Louis J. Naftalison.

S. S. No. 124-10-5937

At New York City

Case No. 511-314-40R

On September 11, 1940

Date of Decision: October 9, 1940

Appearances:

Mike Cassaretakis, Claimant.

Standard Dredging Corporation, by Walfred L. Paulson, Vice-President and Secretary; George F. Gee, Dredging Captain; Ray Pippitt, Clerk.

Kirlin, Campbell, Hickox, Keating & McGrann, by H. Maurice Fridlund, Esq.; Roy T. Parker, Esq. Earl Q. Kullman, Esq., of Counsel, attorneys for employer.

Division of Placement and Unemployment Insurance, Legal Bureau, by Harry I. Rosen, Esq.

Issue:

Whether claimant, while employed as a cook and cooks' helper aboard a dredge, worked in covered employment.

Findings of Fact:

Claimant worked aboard the dredge "Miami" from February 4, 1939, to March 15, 1939, while the dredge was located in the waters at Bayonne, New Jersey. During this period his employer was the Standard Dredging Corporation of New Jersey, the owner of the vessel.

From March 15 to August 15, 1939, claimant was employed aboard the same dredge, but during this period his employer has been established to be the Standard Dredging Corporation (a New York corporation). Both concerns are interrelated, and it has been established that the New York corporation operated the dredge from March 15 to August 15, 1939, at least under a charter arrangement with the New Jersey corporation.

Claimant's services for the New Jersey corporation having been performed wholly outside the State of New York, his employment and earnings have been disregarded for the purpose of this decision.

The Standard Dredging Corporation of New York is a covered employer. During the period with which we are concerned, it was engaged in operating the dredge "Miami" in Gravesend Bay, which is adjacent to the Borough of Brooklyn, City of New York. It had a contract with the City of New York Park Department to pump material from beneath the surface of Gravesend Bay on to the land in order to fill in the shore line and create an addition to a public highway under the jurisdiction of the Park Department. The dredge was non-self-propelled, but moved from spot to spot in the vicinity of its operations by means of cables or spuds. The material excavated from underneath the waters was conveyed to land by means of pipe lines attached to the dredge, and which rested upon pontoons spaced between the dredge and the shore.

A superintendent was in charge of the workers aboard the dredge, and although maritime titles were applied to these positions, the description of the work seems to indicate that their labors were principally with the operation of the dredging machinery and engines, as well as the incidental work connected therewith.

Claimant's work was that of assistant cook, dishwasher and waiter, taking care of the feeding requirements of the personnel of the dredge. He slept aboard the dredge. During the last few weeks of his employment, he served as a watchman while the dredge was out of operation and tied up.

The employer has fixed the value of claimant's maintenance at a dollar per day, and the claimant has accepted this figure as a reasonable one.

The employer has not paid contributions on the earnings of claimant and others similarly situated, because it contends that claimant is a member of a crew of a vessel and, therefore, is excluded from the coverage of the New York State Law. It further contends that the dredging operations were wholly maritime in character because they were performed following the issuance of a permit by the United States Engineer's office of the War Department. It appears that this governmental agency is charged with the duty of exercising control over the navigable waters, and that it is a condition precedent to working in such waters for a permit to be issued from this agency.

The work of the dredge in this particular instance was definitely in connection with the construction of a highway on land. It carried no cargo, nor passengers. It definitely was not engaged in the general work of navigation. The personnel aboard the dredge were not required to be licensed by any federal agency. The employer's attorneys argue that it is not the use to which the dredge was put that controls, but rather its nature, and that it was adapted to do wholly maritime work in the deepening of harbors and removing of obstructions from channels, et cetera.

At the conclusion of the case there was no dispute between the parties as to claimant's earnings.

They are as follows:

Standard Dredging Corporation,
(A New York corporation),
80 Broad Street,
New York, New York.

1939.

First Quarter	Second Quarter	Third Quarter
93.31	339.96	140.83

Decision:

The attorneys for the employer spent considerable time in arguing that the dredge "Miami" is a vessel documented under the laws of the United States. This conclusion, however, is not controlling on the unemployment insurance issue before me. They further argue that a cook, or cook's helper, is a member of a crew of a vessel. Again, that broad proposition is not applicable to the facts in the immediate case. They further contend that the work of the dredge "Miami" in this particular instance was distinctly maritime, because it was done pursuant to a War Department permit. However, the compliance with the War Department's regulations, as to the performance of operations on the navigable waters of the United States, does not take away from the State of New York the right to tax employment such as is here concerned.

The operations of the dredge "Miami" involved construction rather than navigation. It was intimately connected with, and was part of, a distinct land operation, namely, to fill in the shore line to create a roadway on land. The work was done under the supervision of a superintendent rather than the officer of a vessel.

This case is controlled by the decision of the Appeal Board in Case No. 1180-39, which held that even though the employment involved may be maritime, that in and of itself was not sufficient to deprive the State of New York of the

right to tax the payrolls concerned. The Appeal Board held that the claimant in that case, employed on a hydraulic dredge operating similar to the "Miami" in this case, worked in covered employment, and that unless Congress had reserved to itself exclusive jurisdiction in this maritime situation, the State of New York was free to legislate and tax. In this case New York has jurisdiction because all of the work here involved was performed within its territorial borders.

The only question which now remains is whether claimant comes within the definition of the phrase, "officers and members of a crew of a vessel," as prescribed in the Social Security Act. The Appeal Board has ruled that this is a phrase of exclusion and should be given a narrow construction. The Appeal Board has found that the term "crew" is referred to, and is naturally and primarily thought of, as including those who are on board and aiding in the navigation of a vessel. The nature of claimant's employment with relation to the dredge upon which he worked is determinative of the question whether he was to be considered a member of a crew within the purview of the Federal Act.

Claimant, working aboard a non-self-propelled dredge operating in New York harbor to aid in land work, is definitely not a member of a crew within the compass of the Federal intention. The dredge was not engaged in navigation, nor in the transportation of passengers or freight. It had no officers in the accepted sense of htat word, nor a crew, within the same meaning. Despite maritime titles, the work was in the construction field, under the direction of a superintendent, who was placed in authority above the so-called captain of the dredge.

On the basis of the Appeal Board decision, as herein discussed, I find that claimant worked in covered employment within the meaning of the Unemployment Insurance Law of the State of New York, and that he is entitled to be credited with the foregoing earnings, towards the payment of benefits due. I further hold that the employer is liable for contributions accordingly on the earnings of claimant and others similarly situated.

A copy of this decision is being sent to the Bureau of Tax and Wage Records for the collection of contributions due.

LOUIS J. NAFTALISON,
Referee.

9/5/40—A. Weinstein.
9/11/40—W. Newrock, Bk. No. 125.
10/7/40—D. Codner, Decision Only.

To: Mike Cassaretakis, 311 West 27th Street, New York, New York. Standard Dredging Corporation, 80 Broad Street, New York, New York. Kirlin, Campbell, Hickox, Keating & McGrann, Esqs., 120 Broadway, New York, New York. Harry I. Rosen, Esq.

FILE COPY

FILED
APR 28 1943

Supreme Court of the United States

October Term, 1942.

No. 722

STANDARD DREDGING CORPORATION, Employer,
Appellant,

vs.

FRIEDA S. MILLER, INDUSTRIAL COMMISSIONER, *et al.*

On Appeal from the Supreme Court of the State of New York, Appellate Division, Third Department.

BRIEF FOR APPELLANT.

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Supreme Court of the United States

OCTOBER TERM, 1942

STANDARD DREDGING CORPORATION, Appellant, *vs.* FREDA S. MILLER, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, AND MIKE CASSARETAKIS.	No. 722

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT.

BRIEF FOR APPELLANT.

On the application of Standard Dredging Corporation, an appeal to this Court was allowed by the Honorable Irving Lehman, Chief Judge of the New York Court of Appeals, by order dated January 6, 1942, from a final order of the Court of Appeals of the State of New York dated October 15, 1942, which reversed an order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, entered on the 10th day of November, 1941, and affirmed a determination of the New York State Unemployment Insurance Appeal Board that the employment by the appellant of Mike Cassaretakis, the claimant herein, was covered by the New York State Unemployment Insurance Law and that the appellant herein was therefore liable for contributions under said law based upon wages paid to said claimant.

Opinions Below.

The opinion of the Court of Appeals is officially reported in 289 N. Y. 119.[1]

The Appellate Division wrote no opinion except a memorandum decision reported in 263 App. Div. 773.[2]

The opinions of the New York State Unemployment Insurance Appeal Board and the Referee appear in the Record herein.[3]

Jurisdiction.

Jurisdiction to review the decision and order of the Court of Appeals here in question is conferred upon this Court by Section 237 (a) of the Judicial Code[4] and the Act of January 31, 1928.[4a] There is here drawn in question the validity of the New York Unemployment Insurance Law[5] on the ground that said statute, as applied to maritime employment, is repugnant to Article III, Section 2 of the Constitution of the United States. The decision of the Court of Appeals was in favor of the validity of said law as so applied. Accordingly, this court has jurisdiction on this appeal.[6]

Statement.

(A) The Decisions Below.

This cause originated by the filing by the claimant, Mike Cassaretakis, with the Division of Placement and

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[1] R. 107.

[2] R. 104-5.

[3] R., pp. 2-3; R. 5-9.

[4] 28 U. S. C. A. 344.

[4a] 45 Stat. 54.

[5] New York Consol. Laws, Chap. 31 (Labor Law, Art. 18).

[6] See: *Hall* v. *DeCuir*, 95 U. S. 485, 500; *Stewart* v. *Sadrakula*, 309 U. S. 94.

Unemployment Insurance, New York State Labor Department, of a request for a hearing to determine whether the claimant's employment by the appellant was covered by the New York Unemployment Insurance Law, thus requiring the appellant to make contributions to the New York Unemployment Insurance fund based upon the wages paid to the claimant.

After a hearing before one of the Referees appointed by the Industrial Commissioner, the Referee rendered a decision holding, contrary to the contentions of the appellant, that the claimant was not a member of the crew of a vessel operating on the navigable waters of the United States; that there was no constitutional prohibition against the coverage by the New York Unemployment Insurance Law of maritime employment; that said law did cover such employment; and that the appellant was liable for the payment of contributions under said law.

Under the statute, the decision of the referee is not deemed limited in its effect to the immediate employee making the claim for benefits, but is deemed a general determination of the question so decided with respect to *all* those employed by the employer for all purposes of the statute, subject, however to a right of appeal.[6a]

The appellant appealed from the Referee's decision to the New York Unemployment Insurance Appeal Board, specifying as the grounds for such appeal, among others, that the claimant was employed as a member of the crew of a vessel documented under the laws of the United States and operating at the times in question on the navigable waters of the United States; that the claimant's employment was maritime in nature and therefore subject to the exclusive jurisdiction of the Federal Government; that such employment

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[6a] New York Labor Law, Sec. 530(2), Appendix A.

was not covered by the New York Unemployment Insurance Law; and that, if such employment was intended to be so covered, the law was unconstitutional and void.[7]

Thereafter, the Unemployment Insurance Appeal Board rendered a decision which affirmed in all respects the decision of the Referee and adopted as its own the Referee's findings of fact and conclusions of law.[8]

On appeal by the appellant here, the Appellate Division of the New York Supreme Court, Third Judicial Department, reversed the decision of the Appeal Board.[9]

On appeal by the Industrial Commissioner, the Court of Appeals, by its order dated October 15, 1942, and which is the order here under review, reversed the order of the Appellate Division and affirmed the previous determination of the Appeal Board.

In its opinion, the Court of Appeals held:[10]

> (1) That there is no constitutional objection to the coverage of maritime employment by the New York Unemployment Insurance Law;
>
> (2) That Congress did not exclude maritime employment from coverage by State unemployment insurance by the enactment of Section 1607(c)(4) of the Internal Revenue Code, which specifically excludes from the coverage of the Federal Unemployment Insurance Law, officers and members of the crew of a vessel on the navigable waters of the United States;
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> (3) That the determination of the Unemployment Insurance Appeal Board that the claimant was not a member of the crew of a vessel involved solely a

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[7] R. 4.
[8] R. 2-3.
[9] R. 105.
[10] R. 107-15.

question of fact which, being supported in the record by substantial evidence, was conclusive on the courts.

On October 22, 1942, an order was made and entered in the Appellate Division of the New York Supreme Court, Third Judicial Department, on the remittitur of the Court of Appeals, reversing the aforesaid order of the said Appellate Division therein made and entered on December 1, 1941.

(B) The Facts.

Claimant's Employment: The claimant was employed aboard the dredge *Miami*, first as a cook's helper and later as a night cook. His employment on the *Miami* commenced on February 4, 1939 and terminated on or about August 17, 1939. During the period February 4, 1939 to and including February 23, 1939, the *Miami*, which was owned by the appellant's parent corporation, was engaged in dredging operations in the navigable waters of the State of New Jersey.[11] Thereafter, the dredge was chartered to the appellant and, on or about March 15, 1939, commenced dredging operations in the navigable waters of Gravesend Bay, New York Harbor, adjacent to the Borough of Brooklyn, City and State of New York.[12]

The claimant's duties consisted of preparing meals, helping to wait on the tables and cleaning up the kitchen, dining room, and the cabins in which the crew slept. He ate three meals a day on board the dredge and, customarily, slept there.[13]

Physical Characteristics of Miami: The dredge *Miami* is a hydraulic suction dredge, documented as a vessel of the United States. She is a steel vessel 153 feet long, 40

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[11] R. 13, 20, 69, 74-77, 82, 84.
[12] R. 27-31, 76.
[13] R. 12-15, 20, 21.

feet beam and 9¼ feet deep, having a net tonnage of 547 tons.[14] While not equipped with a propeller, the dredge is capable of self-propulsion by the use of swinging cables attached to anchors and spuds.[15] The dredge's operations require that she keep moving ahead.[16] Steam and electric power is generated aboard the dredge.[17] She has no lines running ashore for water or electricity.[18] She is a sea-going dredge, which after completing the Gravesend Bay job, made the voyage to Jacksonville, Florida, and after completing a job there, moved on to another job at Tampa, Florida.[19]

Thus the operation of the *Miami* took her within a short time to the States of New Jersey, New York and Florida.

Officers and Crew of Miami: During the dredging operations, the *Miami* carried a crew of from 42 to 50 men working on three shifts.[20] Her certificate of enrollment calls for a minimum crew of 12, exclusive of the master.[21] The crew was under the direct orders of the captain.[22] Claimant testified concerning the captain: "He is boss for everything. * * * If you don't do your work, he fires you. * * * He is in charge of everything."[23] The deck department was looked after by a mate with deck-hands under him.[24] The leverman operated the hydraulic pump and saw to it that the suction was applied in the proper area.[25] The

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[14] Exhibit B, R. 26, 27, 90A, 90B; Exhibit G, R. 53, 100A.
[15] R. 35, 52, 53.
[16] R. 53, 54.
[17] R. 55.
[18] R. 55.
[19] R. 34.
[20] R. 47.
[21] Exhibit B, R. 27, 90A.
[22] R. 48.
[23] R. 17.
[24] R. 48.
[25] R. 58.

engineroom crew consisted of the chief engineer, first, second and third assistant engineers, firemen, oilers and wipers.[26] The commissary department consisted of a cook, a cook's helper and a steward; they did the cooking and also the work of cleaning, etc.[27] Appellant furnished sleeping facilities and meals aboard the dredge for its officers and crew.[29]

Operation of Miami: In operation, the dredge moved forward by swinging alternately on each of its spuds by means of cables attached to anchors, power being supplied by the engine in the dredge.[29] The pump sucked up the sand and other material from the ocean bottom and sent the dredged material through large pipe lines to the place of deposit[30] which might be up to fifteen miles or more away.[31] The pipe lines were suspended over the water by pontoons.[32] The dredged material was deposited partly under water at some distance from the dredged area, and partly in shallow water to make new land.[33] The dredge was assisted by various small boats which helped place her anchors and bring her supplies.[34]

Gravesend Bay Job: While operating on this job, during the course of which claimant was employed, the dredge *Miami* was at all times afloat at Gravesend Bay, which is a navigable water adjacent to Brooklyn, N. Y.[35] She was dredging an irregularly shaped area located outside the

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[26] R. 48.
[27] R. 48.
[28] R. 17, 57.
[29] R. 35, 52, 53.
[30] R. 36, 50.
[31] R. 16.
[32] R. 35.
[33] R. 50.
[34] R. 50, 55, 58.
[35] R. 31, 61.

pierhead line between Norton Point, Coney Island and Dykers Beach Park.[36]

This dredging job was done pursuant to a War Department permit which permitted digging to a maximum depth of 50 feet below mean low water mark over a navigable area; the dredged material was required to be deposited shoreward of a bulkhead constructed by the City of New York.[37] This War Department permit was issued only after public notice, which stated, "The decision as to whether or not a permit will be issued must rest primarily upon the effect of the proposed work on navigation."[38]

The area required to be filled was navigable water ranging in depth from 2.4 feet to 13 feet at the commencement of the dredging operations.[39] While operating, the dredge was approximately 2,000 feet off the nearest shore point.[40]

Shore Gang: Where a land fill is being created, a shore gang made up of unskilled laborers, usually from 50 to 100, work at leveling the fill. The shore gang is separate and distinct from the dredge crew.[41] Members of the shore gang were not permitted aboard the dredge, as the appellant's regulations prohibited it.[42]

Unemployment Insurance Taxes: The appellant paid contributions under the New York Unemployment Insurance Law on wages of the shore gang, but not on wages of the dredge crew.[43]

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[36] R. 30, 31, Exhibits D, E and E-1, R. 92A, 93, 94.
[37] Exhibits D, E and E-1.
[38] Exhibit D.
[39] R. 66, Exhibits E and E-1.
[40] R. 51.
[41] R. 48, 49.
[42] R. 49.
[43] R. 69.

The United States Treasury Department ruled, on January 4, 1937, that the services performed by the officers and members of the crews of the dredge *Miami* and other dredges (owned by appellant's parent) were exempt from the Social Security Act.[44]

A Specification of the Error to be Urged.

Appellant intends to urge each of the errors heretofore set forth and claimed in its assignments of error.

Summary of Argument.

On the record herein, the appellant intends to argue as follows:

(1) That the claimant was a member of a crew of a vessel operating on the navigable waters of the United States as a matter of law.

(2) That the application of the New York State Unemployment Insurance Law to maritime employment, and especially to officers and members of a crew of a documented vessel operating on the navigable waters of the United States, is unconstitutional in that it violates the provisions of Article III, Section 2 of the Constitution of the United States which reposes exclusive maritime jurisdiction in the Federal Government;

(3) That even if the State of New York could legislate with respect to the regulation of maritime employment, in the absence of Federal legislation with respect thereto, Congress has already occupied the field;

(4) Congress has indicated that it intended to exclude maritime employment from coverage by state unemployment insurance laws.

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[44] Exhibit F, R. 32, 98.

(5) The Constitutional rule requiring National uniformity with respect to the laws applicable to maritime employment has a peculiar application to the case of seamen.

ARGUMENT.

Introduction.

The New York Unemployment Insurance Law,[45] is one of a series of state unemployment insurance laws enacted under the impetus of the Federal Social Security Act.

In his message to Congress sponsoring the enactment of the Social Security Act, the President said:[46]

> "With respect to unemployment compensation, I have concluded that the most practical proposal is the levy of a uniform federal payroll tax, ninety per cent (90%) of which should be allowed as an offset to employers contributing under a state unemployment compensation act. *The purpose of this is to afford a requirement of a reasonably uniform character for all states cooperating with the federal government,* and to promote and encourage the passage of unemployment compensation laws in the states. The ten per cent (10%) not then offset should be used to cover the cost of federal and state administration of this broad system. Thus, states will largely administer unemployment compensation, *assisted and guided by the federal government.*"

Thus it appears, as was so clearly pointed out by this Court in *Buckstaff Bath House Co.* v. *McKinley*:

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[45] New York Consolidated Laws, Chap. 31 (Labor Law, Article 18).

[46] Congressional Record, Vol. 79, Part 1, p. 545, at p. 546.

Emphasis throughout this brief supplied, unless otherwise indicated.

> "The [Social Security] Act was designed * * * to operate in a dual fashion--*state laws were to be integrated with the Federal Act;* payments under state laws could be credited against liabilities under the other. That it was designed so as to bring the states into the cooperative venture * * * [and] that there were great practical inducements *for the states to become components of a unitary plan for unemployment relief.*"[47]

THE NATURE OF THE STATE STATUTE.

The New York Unemployment Insurance Law is not merely a tax statute. The Court of Appeals itself conceded that the New York statute is more than a mere tax statute, for in attempting to distinguish the Federal and State laws, the Court said: [48]

> "The Federal statute, of course, is not an unemployment insurance law. It is a mere taxing statute * * *."

The tax aspect of the New York law is only incidental to its much broader purposes which are essentially regulatory in nature. The statute is intended not merely to alleviate the hardship arising from unemployment, but is also aimed at the regularization and elimination of unemployment.

The real nature of the statute is indicated in its "Declaration of Public Policy of State which reads in part as follows:

> "As a guide to the interpretation and application of this article, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, welfare and morals of the people of this state.

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[47] 308 U. S. 358, 363.

[48] R. 114.

> Involuntary unemployment is therefore a subject of general interest and concern *which requires appropriate action by the legislature to prevent its spread and to lighten its burden* which now so often falls with crushing force upon the unemployed worker and his family."[49]

The New York statute further provides in part as follows:

> "3. It shall be one of the purposes of this article to promote the regularization of employment in enterprises, localities, industries, and the state. The commissioner shall take such steps as are within his means for the reduction and prevention of unemployment."[50]

Thus it becomes apparent that the purpose of the statute is two-fold, namely, to alleviate the conditions arising from unemployment and to take appropriate measures to prevent it. The first purpose is accomplished by paying certain prescribed benefits for limited periods of time to unemployed persons who previously worked in employment covered by the law.[51] In order to pay such benefits, contributions are exacted from employers, measured by a percentage of their payrolls.[52]

In order to accomplish the second, and by far the broader purpose of the statute, namely the regularization and, in so far as possible, the prevention of unemployment, the Industrial Commissioner is authorized to employ experts and to carry on any investigation and research which he deems relevant.[53]

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[49] N. Y. Labor Law, Sec. 500.
[50] Ibid., Sec. 518.
[51] Ibid., Secs. 503-509.
[52] Ibid., Secs. 515, 516.
[53] Ibid., Sec. 518.

Provision is also made for the establishment by the Commissioner of employment districts throughout the State and the maintenance of employment offices in each of such districts to aid persons seeking employment.[54] Indeed, a person who becomes unemployed, and who is entitled to receive benefits, is required to report periodically to the employment office in his district and, under certain conditions, must accept employment offered him or lose his rights to benefits.[55]

In futherance of the regulatory plan of the statute to reduce unemployment, provision is made for the eventual incorporation therein of a "merit rating" system, whereby the amount of contributions to be paid by an employer, or a group of employers, in a given field of employment, would be in direct ratio to the amount of unemployment in such business or industry. The law creates an advisory council, having full investigatory powers and full access to all sources of information, which is charged with the duty to

> "investigate and study the operation of this article upon the basis of the actual contribution and benefit experience hereunder with a view to classifying or grouping employers, employments, occupations or industries with respect to the frequency and severity of unemployment of each, taking due account of any relevant and measurable factors relating thereto, and to report on the practicability of the establishment of a rating system which would most equitably operate to rate the unemployment risk and fix the contributions to such fund for each employer, group of employers, employment, occupation or industry and to encourage the stabilization of employment therein."[56]

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[54] Ibid., Sec. 518.
[55] Ibid., Secs. 503, 506.
[56] Ibid., Sec. 518, subdiv. 4.

Covered Employment Under the New York Statute.

Unlike the Federal Unemployment Tax Act[57] (formerly Title IX of the Social Security Act), and those of most of the other States, the New York statute has never contained a provision specifically excluding from its coverage employment as an officer or member of a crew of a vessel operating on the navigable waters of the United States.[58]

Although the New York statute, since its original enactment (L. 1935, Ch. 468), has always defined covered employment in sufficiently broad terms to include maritime employment, it was administratively construed shortly after its enactment not to apply to such employment.

In 1936, the Attorney General of the State of New York rendered an official opinion which held that the statute could not constitutionally be applied to officers and members of the crew of a vessel. The official headnote of the opinion reads as follows:

> "The Unemployment Insurance Fund Act does not apply to owners of vessels documented under the laws of the United States, or to owners of tug, ferry boats, etc., operating exclusively in navigable waters within the geographical limits of the State."

And the opinion went on to state that:

> "The New York State law, however, is silent as to admiralty employment and there being no specific exemption, the State law provisions seem to be all embracing. There being no exemption, at first blush it would appear that officers and members of crew should be included in our State law. The decision

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[57] 26 U. S. C. A. 1600-1611.

[58] N. Y. Labor Law, Sec. 502 (1), McKinneys, Vol. 30, Historical Note, Supplement, page 45.

> of the United States in the *Knickerbocker* [Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149] and *Washington* [State of Washington *v.* Dawson, 264 U. S. 219] cases seem to hold that such inclusion, however, is unconstitutional and in contravention of federal statute."[59]

Significantly, since the issuance and publication of the Attorney General's opinion in 1936, the New York State Legislature has amended the definition of "employment" in the Unemployment Insurance Law, on at least four occasions, but it never attempted to overrule the opinion of the Attorney General by expressly including maritime employment within the coverage of the law.[60]

POINT I.

THE CLAIMANT WORKED AS A MEMBER OF THE CREW OF A DOCUMENTED VESSEL OPERATED ON THE NAVIGABLE WATERS OF THE UNITED STATES.

The Court of Appeals conceded that the claimant Cassaretakis was engaged in maritime employment, but affirmed the determination of the Appeal Board that the claimant was not a member of the crew of a vessel. In its opinion the Court stated:[61]

> "As to the four claimants who were found to be members of the crews of vessels, *Sheredos was a cook on a self-propelled vessel* carrying petroleum between points in New York and New Jersey; Schein was an attendant on a speed boat which transported passengers to the Worlds Fair; Knowlson was a second

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[59] 1936 Op. Atty. Gen. 258.
[60] Note 58, *supra.*
[61] R. 108, 109.

> engineer on a tugboat; Smith was a fireman on a lighter. *All were plainly members of crews of vessels.* On the other hand, *Cassaretakis was assistant cook on board a dredge* which was employed in a land filling operation in connection with the construction of a public highway. * * * *The employment of* [Cassaretakis], *therefore may be deemed incidental to construction* * * * *operations* * * * *rather than to navigation.*"

Since the Court of Appeals, the Appeal Board and the Referee were in complete unanimity of opinion that Sheredos, a cook aboard a self-propelled oil tanker, was a member of a crew of a vessel,[62] it is at once apparent that it was not because of the nature of his duties that the claimant Cassaretakis was held not to be "a member of the crew". As appears from the decision of the Appeal Board, which was affirmed by the Court of Appeals, Cassaretakis was held not to be "a member of the crew" because the dredge on which he was employed was held not to be a "vessel." In its decision in the instant case, the Appeal Board said:[63]

> "Appeal Board No. 2552-40 [the Sheredos case] relied on by the appellant, is not in point. The latter case involved a 'vessel propelled by steam commissioned to carry petroleum products.' *In the instant case, the vessel is a non-self propelled dredge carrying neither cargo nor passengers.*"

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[62] *Lake Tankers,* Appeal Board Case No. 2552-40, now on appeal to this Court. *Sub Nom. Lake Tankers Corp.* v. *Miller,* Docket No. 813, October Term 1942. Accord: Appeal Board Case No. 496-38. See also: *Allen* v. *Hallett,* Abb. Adm. 573, Fed. Cas. 223; *Maryland Casualty Co.* v. *Lawson* (C. C. A. 5th, 1938), 94 F. (2d) 190; *The Marie,* 49 Fed. 286; *The Yacht Revenge,* 1940 A. M. C. 510; *The Buena Ventura,* 243 Fed. 797; *cf. Warner* v. *Goltra,* 293 U. S. 155; U. S. Treasury Reg. 107, Sec. 403.211.

[63] R. 3; see also Referee's decision at R. 8.

It is submitted that such a determination involves a basic proposition of law and one of constitutional jurisdiction. Parenthetically, it may be added that this same question is basic, not only under the New York law, but also under the unemployment insurance laws of many of the other States which (like the Social Security Act) have specifically exempted "members of the crew of a vessel operating on the navigable waters of the United States."

(A) The Dredge Miami on which Claimant was Employed is a Vessel.

The dredge *Miami* was licensed and enrolled as a vessel of the United States.[63]

It should be unnecessary to argue that a large modern hydraulic dredge such as the *Miami* is a "vessel" within the meaning of Federal and State statutes.

As previously pointed out herein, the *Miami* is a seaworthy vessel, designed to operate on navigable waters and capable of long ocean voyages which she has made from time to time.[64] Its function is to pick up sand, mud and other materials at one time and transport such materials to another point.[65] The *Miami* carries her own sea stores, fuel, supplies and materials. When engaged in dredging operations, she carries a crew of 42 to 50 men, and when at sea she usually transports a crew of from 25 to 30 men.[66]

Even if the Miami were not self-propelled, she would still be a "vessel" under the authorities. The fact that she delivers her cargo by pipe line, instead of by a sling, is immaterial. As early as 1884 it was held that dredges are vessels engaged in and having direct relation to com-

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[63] Exhibits A and B, R. 89, 90A.
[64] Page 6, *supra.*
[65] Page 7, *supra.*
[66] Page 5-7, *supra.*

merce and navigation.[67] Since then, the Federal courts have consistently held that dredges are "vessels" engaged in navigation, maritime transportation and commerce.[68]

(B) The Dredge on which Claimant was Employed was Being Operated on Navigable Waters.

The *Miami* was at all times here in question afloat and operating on navigable waters adjacent to Brooklyn, N. Y. and while engaged in dredging was approximately 2,000 feet off the nearest shore point.[69] Her operations were clearly maritime.

Apparently the Appeal Board considered that, since the *Miami* pumped her dredged materials landward to create new shorefront, she was no longer engaged in maritime work. Such assumption is contrary to settled law. In *Bowers Hydraulic Dredging Co.* v. *Federal Contracting Co.*, it was held that "such artificial distinctions as arise out of the work of the dredging being performed partly on land and for the purpose of a land transaction, should not

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[67] *The Dredge Alabama* (D. C. Ala., 1884), 19 Fed. 544, aff'd 22 Fed. 449.

[68] *Charles Barnes Co.* v. *One Dredge Boat* (D. C. E. D. Ky., 1909), 169 Fed. 895; *Saylor* v. *Taylor* (C. C. A. 4th, 1896), 77 Fed. 476; *Ellis* v. *United States* (1907), 206 U. S. 246; *Warren & Arthur Smadbeck Dredging Co.* (C. C. A. 2nd, 1931), 50 F. (2d) 99 (dredge chartered to build new land with dredged material); *Kibadeaux* v. *Standard Dredging Co.* (C. C. A. 5th, 1936), 81 F. (2d) 670; cert. den. 299 U. S. 549 (modern hydraulic dredge pumping dredged material through pipe lines over pontoons to shore); *Maryland Casualty Co.* v. *Lawson* (C. C. A. 5th, 1938), 94 F. (2d) 190, 192; *Woods Bros. Construction Co.* v. *Iowa Unempl. Comp. Div.* (Feb. 11, 1941), 229 Iowa 1171, 296 N. W. 345 (barge).

For an exhaustive discussion of the subject see "Constitutionality of State Unemployment Legislation as Applied to Dredge Boat Crews" (by E. P. Deutsch), Tulane Law Review (Feb., 1941), Vol. XV, pp. 241-62.

[69] R. 31, 51, 61 and Exhibits D, E, E-1.

oust the court of jurisdiction of a floating structure which in its ordinary purpose is distinctly maritime."[70]

Furthermore, to make the maritime nature of the work complete in the instant case, two additional facts are present. The dredged material was picked up in navigable waters[71] and was deposited at a place which had theretofore been navigable waters.[72] Under the *Bowers* case, *supra*, the work would have been maritime, even if the fill had been deposited on dry land.

The case of *South Chicago Coal & Dock Co.* v. *Bassett*,[73] referred to by the Court of Appeals in its opinion below,[74] has no application to the instant case. This Court was not there concerned with the determination of what constitutes a "vessel", but rather with the question of whether the nature of the injured employee's services to the vessel constituted him a "member of a crew of a vessel" within the meaning of that term as used in the Longshoremen's and Harbor Workers' Compensation Act.[75] In the instant case, the question is not whether the nature of the claimant's duties constitute him "a member of the crew", but rather whether the dredge on which claimant was employed is a "vessel".

Furthermore, the nature of the employment in the *Bassett* case bore no resemblance to that of claimant here. In that case, this Court, in affirming the decision of the Circuit Court, stated (p. 260):

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[70] 148 Fed. 290, 294 (1906); aff'd (C. C. A. 2nd, 1907), 153 Fed. 870; cert. denied 207 U. S. 587. Accord: *Warren & Arthur Smadbeck, Inc.* v. *Heling Contracting Corp.*, 50 F. (2d) 99.

[71] Exhibit D, R. 30, 92A; Exhibit E-1, R. 66, 94.

[72] R. 30 and Exhibit D.

[73] 309 U. S. 251.

[74] R. 108.

[75] 33 U. S. C. A., Sec. 901.

> "What the court considered as supporting the finding of the deputy commissioner was that the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was wanted and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as 'in the position of longshoremen or other casual workers on the water.' *Scheffer* v. *Morgan Towing Co.*, 68 F. 2d, 11, 12. Even if it could be said that the evidence permitted conflicting inferences, we think that there was enough to sustain the deputy commissioner's ruling."

As distinguished from the *Bassett* case, *supra*, the claimant here was concededly engaged aboard the dredge in preparing and serving meals to the others members of the crew while the dredge was in motion and carrying on its operations. Also he was regularly employed on the basis of a six-day week and he slept on board the dredge.

Clearly, the instant case deals with a "member of the crew of a vessel operating on the navigable waters of the United States."

POINT II.

THE NEW YORK UNEMPLOYMENT INSURANCE LAW AS APPLIED TO MARITIME EMPLOYMENT IS UNCONSTITUTIONAL AND VOID.

The New York statute when applied to employment as an officer or member of the crew of a documented vessel operating on the navigable waters of the United States, violates Article III, Section 2 of the Constitution of the

United States which confers exclusive jurisdiction over matters maritime upon the Federal Government.

In upholding the constitutionality of the New York Unemployment Insurance Law as applied to maritime employment, the New York Court of Appeals held that the statute merely levied a non-discriminatory excise tax based upon the exercise of the right or privilege of employing individuals and measured by wages paid to them. The Court held that the right to levy such a tax is inherent in state sovereignty and that it in no way affects the rights, duties or obligations of the parties to a maritime contract and in no way interferes with or contravenes the rule of uniformity required in maritime matters.

As previously shown herein, the New York statute is much more than a mere tax statute. In its broader aspects, it is essentially a regulatory statute, aimed at the prevention of unemployment.[76]

It is contended, however, that the statute as applied to maritime employment is unconstitutional, (a) whether considered purely as an excise tax or (b) whether it is viewed as an exercise of the police power of the state.

(A) New York State may not exact a tax for the privilege of exercising a federal franchise.

The dredge, upon which claimant here was employed, was duly enrolled and licensed by the Federal Government to engage in the coasting trade.[77] The privilege thus conferred must necessarily have included the right or privilege of having in one's employ persons capable of manning the dredge for, otherwise, the grant of the license by the Federal Government would have been meaningless.

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[76] *Supra*, at pp. 11-13

[77] Exhibits A and B, R. 26, 89, 90A.

In *Gibbons* v. *Ogden*, this Court, referring to the privileges conferred by enrollment and license under the Federal statutes, said [78]

> "These privileges cannot be separated from the trade, and cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists."

When the State of New York attempts, as it is doing here, to exact from the appellant a tax for the privilege of having individuals in its employ, the State is in fact subjecting to tax the use and employment of the Federal license granted to appellant to operate its dredge on the navigable waters of the United States. That the State may not impose this additional burden on a federally granted franchise is clearly evident from the prior decisions of this Court. For example, in *Hall* v. *DeCuir*, this Court stated:[79]

> "Throughout our history, the acts of Congress have regulated the enrolment and license of vessels to be engaged in the coasting trade, and this court expressly determined that a State law which imposed another and an additional condition to the privilege of carrying on that trade within her waters is inoperative and void. *Sinnot* v. *Davenport*, 22 Howard 227; *Foster* v. *Davenport*, 22 *id.* 244; *Wheeling Bridge Company* v. *Pennsylvania*, 18 *id.* 432."

This doctrine was again enunciated in the case of *Moran* v. *City of New Orleans*, involving the right of the City of New Orleans to exact a license fee from towboat owners for

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[78] 9 Wheaton 1, 18.

[79] 95 U. S. 485, 506.

the privilege of operating the same between the Gulf of Mexico and New Orleans. In denying the municipality the right to exact such a tax, this Court said:[80]

> "It [the license fee] is said, however, to be a tax on an occupation, and for that reason not a regulation of commerce. * * * The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the State thus seeks to burden with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under, and which derives from, the Constitution and laws of the United States."

That a State may not impose a tax on instrumentalities essential to the conduct of an activity, the carrying on of which is subject to regulation and control of the Federal Government, is well illustrated by a series of decisions by this Court relating to attempts by the States to tax essential instrumentalities of interstate commerce.

In *Helson* v. *Kentucky*, the State attempted to apply its gasoline tax to gasoline purchased out of the State for use in Kentucky in operating an interstate ferry. This Court held the tax as thus applied to be an exaction for the privilege of using an instrumentality of interstate commerce. The Court said:[81]

> "And is not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? *A tax, which falls directly upon the use of one of the means by which commerce is carried on, directly burdens that commerce.* If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce * * * it is little more

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[80] 112 U. S. 69, 74-75.
[81] 279 U. S. 245, 252.

than repetition to say that *such a tax cannot be laid upon the use of a medium by which such transportation is effected.*"

If, as is clearly indicated in the *Helson* case, *supra*, a State cannot lay a tax "upon the use of a medium" by which interstate transportation is effected, then certainly the same principle must be applicable to maritime operations, a field exclusively within the Federal jurisdiction. The only other difference between the *Helson* case and the instant one is that in the former the "medium" upon which the tax was attempted to be imposed was gasoline, whereas here the tax is being imposed on the right to have in appellant's employ officers and a crew to man and operate its dredge on the navigable waters of the United States in the exercise of a federally granted license.

In *Southern Pacific Co.* v. *Gallagher*,[82] after a review and analysis of its earlier decisions, this Court held that, while a State tax might constitutionally be applied to events *preliminary* to interstate commerce, the States were prohibited, under the principle enunciated in the *Helson* case, *supra*, from exacting a tax as the price of the privilege of using an instrumentality of interstate commerce. Clearly, in the instant case, the tax is not imposed on an event "preliminary" to the operation of appellant's dredge on the navigable waters, but on the very act of operation and for that reason violates the *Helson* doctrine.

The cases cited by the Court below are clearly not in point.[83] *Cooley* v. *Board of Wardens*, permitting State regulation of pilots, was premised on historical grounds. The Court there said:[84]

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[82] 306 U. S. 167.

[83] Opinion, R. 111.

[84] 12 How. 299, 315.

> "• • • it may be observed, that similar laws have existed and been practiced on in the States since the adoption of the federal constitution; that, by the Act of the 7th of August, 1789, 1 Stats. at Large, 54, congress declared that all pilots in the bays, inlets, rivers, harbors and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States, etc.; and that this contemporaneous construction of the constitution since acted on with such uniformity in a matter of much public interest and importance, is entitled to great weight, in determining whether such a law is repugnant to the constitution • • •."

The cases of *Western Union Telegraph Co.* v. *Attorney-General*[85] and *Old Dominion S. S. Co.* v. *Virginia*[86] merely involved the right of a State to impose taxes on property situated within the State.

(B) New York State May Not Regulate Maritime Employment.

Considered as a regulatory statute, the New York Unemployment Insurance Law, as applied to maritime employment, violates the "rule of uniformity" required in maritime matters by reason of the provisions of Article III, Section 2, and Article II, Section 8 of the Constitution of the United States. In *Butler* v. *Boston & Savannah S. S. Co.*, this Court said:[87]

> "As the Constitution extends the judicial power of the United States to 'all cases of admiralty and maritime jurisdiction', and as this jurisdiction is held to be exclusive, the power of legislation on the same subject must necessarily be in the national legislature, and not in the state legislatures."

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[85] 125 U. S. 530.
[86] 198 U. S. 299.
[87] 130 U. S. 527, 557.

Earlier, in the case of *The Lottawanna*, this Court had said:[88]

> "One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."

Subsequently in the cases of *Southern Pacific Co.* v. *Jensen*,[89] *Knickerbocker Ice Co.* v. *Stewart*,[90] and *Washington* v. *Dawson*,[91] this Court again applied the doctrine requiring uniformity in maritime matters to the Workmen's Compensation laws of the States of New York and Washington and held them unconstitutional because violative of such rule.

In *Southern Pacific Co.* v. *Jensen, supra*, the New York State law was held to be invalid because (p. 217) "the necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish;" Thereafter, in 1917, Congress amended the Judicial Code expressly *to authorize* the States to extend their Workmen's Compensation laws to seamen,[92] and New York attempted by new legislation to do so. However, when the law came before this Court

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[88] 88 U. S. 558 (21 Wall.), 575.
[89] 244 U. S. 205 (1917).
[90] 253 U. S. 149 (1920).
[91] 264 U. S. 219 (1924).
[92] Act of October 6, 1917, Chap. 97, 40 Stat. 395.

in *Knickerbocker Ice Co.* v. *Stewart, supra,* it was again declared unconstitutional as applied to seamen, because, as stated by this Court (p. 166):

> "Here, we are concerned with a wholly different constitutional provision—one which, for the purpose of securing harmony and uniformity • • • prohibits material interference by the States. Obviously, if every State may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent."

In 1922, Congress again attempted to amend the Judicial Code so as to permit the application of State Workmen's Compensation laws to seamen.[93] Thereafter the State of Washington attempted to include stevedores aboard vessels in its compensation statute, and once again this Court held that such statutes could not constitutionally be so applied. *Washington* v. *Dawson, supra.* Referring to the amendment to the Judicial Code, this Court in that case said:[94]

> "• • • the manifest purpose was to permit any State to alter the maritime law and thereby introduce conflicting requirements. To prevent this result the Constitution adopted the law of the sea as the measure of maritime rights and obligations. The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within the States may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. *The subject is national.*"

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[93] Act of June 10, 1922, Chap. 216, 42 Stat. 634.
[94] 264 U. S. 219, 228.

It is submitted that the doctrine of uniformity applied by this Court in the Workmen's Compensation cases mentioned above, is equally applicable to the unemployment insurance law here in question. Both laws attempt to alter the incidents of maritime employment. Furthermore, the essential characteristics of both laws are identical, namely (a) the employer is taxed, (b) on a percentage of his payroll (c) with reference to risks of cessation of employment (due to injury in one case and lack of work in the other) (d) paid into a common fund, (e) administered by a State agency, (f) which pays out benefits to the employees, (g) for purposes of social welfare.[95]

Indeed, the similarity between the Workmen's Compensation cases and the New York Unemployment Insurance was emphasized by the Attorney General of the State of New York in his brief filed in this Court in *Chamberlin* v. *Andrews*.[96]

The New York Court of Appeals has attempted to distinguish the Unemployment Insurance statute from Workmen's Compensation laws on the ground that the former "does not in any way operate upon the contract of employment or interfere with maritime and admiralty jurisdiction."[97] With reference to the Workmen's Compensation laws the Court said:[98]

> "These statutes become a part of the contract and thereby directly affect the rights and duties between the parties. * * * 'An award under the Workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon

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[95] *Chamberlin* v. *Andrews*, 271 N. Y. 1, aff'd 299 U. S. 515, rehearing denied 301 U. S. 714; see also 4 Fordham Law Review, 485, 492.

[96] *Supra*, note 95.

[97] R. 113.

[98] R. 112.

> the theory that the statute giving the Commission power to make an award is read into and becomes a part of the contract. (*Matter of Post* v. *Burger & Gohlke*, 216 N. Y. 544.) The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for injuries sustained, or if death results, a certain sum to dependents."

In this respect, there is no difference between the Workmen's Compensation law and the Unemployment Insurance law. In the one case, the contract of employment, by virtue of the statute, contains an implied provision that the employer will make contributions to a fund to provide for injury to the employee during the course of his employment, while in the other, the contract, by virtue of the unemployment insurance law, contains an implied provision that the employer will make the contribution to a fund to provide for the employee if he becomes unemployed. In each case, the contract of employment is modified by the insertion of an insurance provision, one to cover injury, the other to cover lack of employment. Both laws directly affect the rights and liabilities of the parties to a maritime contract of employment and for that reason are, it is submitted, equally invalid when so applied because "the rights and liabilities of the parties arose out of and depended upon general maritime law and "[can] *not be enlarged or impaired by the state statute.*"[99]

But even if a valid distinction did exist between the Workmen's Compensation and the Unemployment Insurance laws, it is submitted that the court below erred in assuming that it is only State legislation affecting the rights and liabilities under maritime contracts which violates the

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[99] *Robins Dry Dock Co.* v. *Dahl*, 266 U. S. 449, 457.

doctrine of uniformity. Regardless of whether a State statute affects a maritime contract, if it attempts to regulate or interfere with the conduct of maritime activities, it violates the rule of uniformity. The true purpose of the rule was aptly stated in *Hall* v. *DeCuir*, where it was said:[100]

> "Those who framed the Constitution never intended that navigation, whether foreign or among the States, should be exposed to such conflicting legislation; and it was to save those who follow that pursuit from such exposure and embarrassment that the power to regulate such commerce was vested exclusively in Congress."

And again in *Knickerbocker Ice Co.* v. *Stewart*, this Court said with reference to the exclusive authority granted to Congress to legislate with respect to maritime matters:[101]

> "The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union."

The wisdom of prohibiting the several States from meddling with maritime employment by the application of their respective unemployment insurance laws is readily apparent. The confusion and impedance resulting from the application of state unemployment insurance to seamen can readily be imagined. It would mean that every ship, whether of American or foreign documentation, would

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[100] 95 U. S. 485, 498.
[101] 253 U. S. 149, 164.

have its crew subjected to coverage by the New York Unemployment Insurance law from the time it entered the ports of this State. Likewise, at each subsequent port of call, the unemployment insurance laws of other States would be applied. This would mean incredible confusion both to the maritime employer and to the maritime employee. Certainly, the application of state unemployment insurance laws is just as objectionable from this viewpoint as was the Workmen's Compensation law under consideration in *Washington* v. *Dawson, supra,* where in holding the statute invalid as applied to maritime employees, this Court pointed out the confusion and difficulty which would result if vessels were compelled to comply with local statutes at every port.

It is submitted that State control "cannot be extended to so general a system as unemployment compensation when applied to seamen without opening a wide breach in the constitutional uniformity required, and desirable in admiralty."[102]

The cases referred to by the Court of Appeals in its opinion do not support the attempt here being made to extend the New York Unemployment Insurance Law to maritime employment.[103] *People ex rel. Cornell Steamboat Co.* v. *Sohmer,*[104] merely sustained a State franchise tax as applied against a corporation of its own creation engaged in navigation. There the tax was imposed for a privilege conferred by the State. The case of *Transportation Co.* v. *Wheeling,*[105] sustained a personal property tax levied by the State on ships owned by residents and based on the value thereof. But the Court was careful to point out (pp. 280-1)

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[102] 15 Tulane Law Review, 241, 260.
[103] R. 113.
[104] 235 U. S. 549.
[105] 99 U. S. 273.

the inability of a State to tax a ship as an instrument of commerce. The case of *Sands* v. *Manistee River Improvement Co.*[106] simply approved State charges for the use of State constructed marine improvements. Once again, an exaction for a benefit conferred by the State.

POINT III.

CONGRESS HAVING PREEMPTED THE FIELD OF REGULATION OF MARITIME EMPLOYMENT, THE STATES ARE EXCLUDED THEREFROM.

It has been previously demonstrated that the authority of Congress to legislate with respect to maritime matters is exclusive and furthermore that such authority cannot even be *delegated* by Congress to the States.[107] But even if the field of regulation of maritime employment were one, where in the absence of action by Congress, the States might legislate, an examination of the Federal statutes will show that Congress has already occupied the field to the exclusion of the States.

U. S. Code, Title 46, Chap. 18, Sec. 713, defines a "seaman" as follows:

> "• • • every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same (any vessel belonging to any citizen of the United States) shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this chapter may be applicable • • •."

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[106] 123 U. S. 288.

[107] Point II, pp. .....

And persons employed on dredges and scows have been held to be "seamen" within this section.[108]

An examination of the Federal statutes will demonstrate the extent to which Congress has legislated not only with respect to the welfare of seamen while employed, *but also while unemployed.*[108a]

Included among the various provisions for seamen contained in the Federal statutes are those relating to wages, clothing, food, hours of labor, and medical care.[109] There are also Federal statutes providing for hospitalization for seamen at the expense of the United States Government;[110] statutes providing for the care of sick and disabled seamen by the Federal Government;[111] a statute providing for the return to this country, at the expense of the Federal Government, of seamen, unemployed, destitute and stranded in foreign ports;[112] statutes setting the beneficiaries of a fund for the relief of sick and disabled seamen;[113] and authorizing the President of the United States to receive donations for such fund.[114]

In 1936, statutes were passed governing all maritime labor relations.[115] As a result of a petition to the President by the Maritime Labor Conference on December 19, 1941, the President created the Maritime [Labor] War Emergency Board to handle all matters between sea-going

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[108] *Saylor* v. *Taylor* (1896), 77 Fed. 476; *The Hurricane*, (1924), 2 F. (2d) 70, aff'd 9 F. (2d) 396.

[108a] See *Aguilar* v. *Standard Oil Co.* ..... U. S. ....., decided April 19, 1943.

[109] 46 U. S. C. A. Ch. 18.

[110] 24 U. S. C. A. 26.

[111] 42 U. S. C. A. 6.

[112] 46 U. S. C. A. 678.

[113] 24 U. S. C. A. 26-a.

[114] 24 U. S. C. A. 2.

[115] 46 U. S. C. A. 1251-1262.

personnel and operators of American merchant ships, to establish a uniform basis for payment of war risk insurance on the lives of crew members, and the establishment of war bonuses to be paid the crews.[116]

On January 1, 1940, the benefits of the old age pension provisions of the Federal Social Security Act were extended to cover officers and members of crews of vessels.[117] It has also been proposed from time to time that Congress establish Federal unemployment insurance coverage for seamen but, while this has been given serious consideration, such legislation has not as yet been enacted.[118]

In addition to the above mentioned statutes, the United States has entered into various treaties with other countries dealing with the welfare of seamen. For example, on June 13, 1938, the Senate gave its consent to the ratification of five treaties adopted by the International Labor Conference, covering various matters affecting the welfare of seamen, including (a) minimum requirement of professional capacity for masters and officers on board merchant vessels, (b) annual holidays with pay for seamen, (c) liability of ship owners in case of sickness, injury or death of seamen, (d) hours of work on board ship and manning, and (e) minimum age for admission of children to employment at sea.[119]

On August 19, 1937, the President of the United States submitted to the Senate certain additional treaties pertaining to the welfare of seamen, together with certain recommendations adopted by the Conference of Interna-

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[116] 1942 A. M. C. 309.

[117] 26 U. S. C. A. 1426 (b)(5).

[118] Hearings before Committee on Merchant Marine and Fisheries, 76th Cong. 3d Session (1940), p. 2; see also H. R. 5446 and H. R. 560 (77th Cong., 1st Sess.) and Hearing before Committee on Merchant Marine and Fisheries, 77th Cong., 1st Sess. (1941).

[119] 1938 A. M. C., Vol. 2, pp. 1285 *et seq.*

tional Labor Organizations. The President requested that the Senate give its advice and consent to the ratification of the treaties and also that the Senate, acting in conjunction with the House of Representatives, take appropriate action to give effect to the recommendations adopted by the Conference of International Labor Organizations.[120]

In addition to the foregoing statutes and treaties pertaining to the welfare of seamen, there are numerous draft Conventions, promulgated by the International Labor Conference and relating to the general welfare of seamen, which have already been adopted by many other nations and will, undoubtedly, in due course be considered and acted upon by the United States.[121]

Thus, it is apparent that Federal Statutes and treaties regulate practically every phase of a seaman's life. As this Court recently said in *Southern Steamship Company* v. *N. L. R. B.*:[122]

> "• • • workers at sea have been the beneficiaries of extraordinary legislative solicitude • • •. The statutes of the United States contain elaborate requirements with respect to such matters as their medicines, clothing, heat, hours and watches, wages, and return transportation to this country • • •."

In view of these many and varied statutes and treaties applicable to seamen, it must be obvious that Congress has completely occupied the field of regulation of maritime

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[120] Draft Convention concerning sickness insurance for seamen; Recommendation concerning the promotion of seamen's welfare in ports; and Recommendation concerning hours of work on board ship. 1938 A. M. C., Vol. 2, p. 1322; "Treaties Submitted to Senate 1935-39", Department of State Publication No. 1516, p. 20. These matters are still pending before the Senate. Department of State Publication No. 1620, p. 4.

[121] See Appendix C.

[122] 316 U. S. 31, 39 (1942). See also *Aguilar* v. *Standard Oil Co., supra, ante* [108a].

employment, *including that of social welfare.* In *Minnesota Rate Cases,* this Court said:[123]

> "It has repeatedly been declared by this court *that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters,* admitting of diversity of treatment according to the special requirements of local conditions, *the States may act* within their respective jurisdictions *until Congress sees fit to act; and, when Congress does act, the exercise of its authority overrides all conflicting state legislation.*"

In the instant case, the subject, namely, maritime employment, is not only one which requires uniformity of regulation, and for that reason is within the exclusive jurisdiction of Congress, but it is also one with respect to which Congress has already exercised its authority to the exclusion of the States.

POINT IV.

CONGRESS HAS INDICATED THAT IT INTENDED TO EXCLUDE MARITIME EMPLOYMENT FROM COVERAGE BY STATE UNEMPLOYMENT INSURANCE LAWS.

Congress has not only legislated with respect to the field of maritime employment, including the welfare of unemployed seamen in so far as was deemed feasible, but has also clearly indicated in the Federal Social Security Act that it intended to exclude such employment from coverage by the States.

The Federal Unemployment Tax Act specifically exempts from its coverage "service performed as a officer

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[123] 230 U. S. 352, 399-400 (1913).

or member of the crew of a vessel on the navigable waters of the United States."[124]

In *Buckstaff Co.* v. *McKinley*,[125] this Court held that whether an employment was covered by the Social Security Act was "extremely relevant" in determining whether such employment was to be covered by a state unemployment insurance law. In that case, the State of Arkansas was attempting to exact unemployment insurance contributions from an Arkansas corporation which had leased from the Secretary of Interior, and was operating, certain bath house facilities in Hot Springs National Park, a Government Reservation. In holding that the corporation was subject to the Unemployment Insurance law of the State of Arkansas, this Court said (pp. 362-64):

> "There can be no question but that the petitioner is liable for the tax levied by §901 of the Social Security Act, unless it is exempted by that portion of §907 which relieves 'an instrumentality of the United States' from that duty. But it seems clear that petitioner is not, within the meaning of the Social Security Act, such an instrumentality. • • •
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> "That petitioner is subject to the Social Security Act is extremely relevant to the solution of the problem at hand. For that Act laid the foundation for a cooperative endeavor between the states and the nation to meet a grave emergency problem. • • • The Act was designed • • • to operate in a dual fashion—state laws were to be integrated with the federal Act; payments under state laws could be credited against liabilities under the other. That it was designed so as to bring the states into the cooperative venture is clear. The fact that it would operate though the states did not come in does not

[124] 26 U. S. C. A. 1607 (c)(4), formerly Sec. 907 (c)(3) of the Social Security Act, Appendix B.

[125] 308 U. S. 358.

alter the fact that there were great practical inducements for the states to become components of a unitary plan for unemployment relief. It is this invitation by the Congress to the states which is of importance to the issue in this case. For certainly, under the coordinated scheme which the Act visualizes, when Congress brought within its scope various classes of employers it in practical effect invited the states to tax the same classes. Hence, if there were any doubt as to the jurisdiction of the states to tax any of those classes it might well be removed by that invitation, for in absence of a declaration to the contrary, it would seem to be a fair presumption that the purpose of Congress was to have the state law as closely coterminous as possible with its own. To that extent that it was not, the hopes for a coordinated and integrated dual system would not materialize.

"Hence, it is our view that on the facts of this case, Congress has given Arkansas implied authority to tax petitioner under its Unemployment Compensation Law since the Congress has included under the Social Security Act employers such as petitioner. Clear evidence of a contrary intention would, of course, negative the existence of the implied authority. But here there is none. *That conclusion is strengthened by the exemption of certain classes of employers from the sweep of the federal Act.* Thus, the exclusion of federal instrumentalities from the scope of the federal Act, and hence from the complementary state systems, emphasizes the purpose to exclude from this statutory system only that well defined and well known class of employers who have long enjoyed immunity from state taxation."

Here we have the converse of the *Buckstaff Co.* case, *supra.* An examination of the Social Security Act shows that Congress, instead of inviting the States to bring maritime

employment within the coverage of their laws, has expressly excluded it from such coverage.

That both Congress and the States fully appreciated that the unemployment insurance laws of the several States could not be applied to those fields of employment that were within the jurisdiction of the Federal Government is evidenced by other provisions of the Social Security Act. As originally enacted, the Act provided in part as follows:[126]

> "No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce or foreign commerce, or that the State law does not distinguish between employees engaged in interestate commerce or foreign commerce and those engaged in intrastate commerce."

We submit that it is highly significant that Congress thus specifically invited the States to cover the field of "interstate and foreign commerce", but did not extend any similar right to a State to cover the field of *maritime* employment. On the contrary, Congress exempted "members of crew" of vessels from the integrated scheme of unemployment insurance.

Since its original enactment, Congress has from time to time amended the Federal statute to permit the unemployment insurance laws of the States to cover (1) instrumentalities of the United States, other than those wholly owned or otherwise exempt, (2) National banks, and (3) persons employed on lands owned or held by the United States.[127] *But Congress has never attempted to amend the Social Security Act so as to permit the States to include*

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[126] 26 U. S. C. A. 1606, formerly Sec. 906 Social Security Act, Appendix B.

[127] 26 U. S. C. A. 1606, Appendix B.

maritime employment within the coverage of their laws. Since Congress has seen fit to remove the Federal immunity from the above enumerated types of employment, why, one may ask, has Congress not done likewise with respect to maritime employment? The answer to this question is at once apparent. In the case of those employments above enumerated, where the Federal immunity has been withdrawn, Congress had the constitutional right to remove such immunity, if it saw fit, and to permit the States to cover such employment. In the case of maritime employment, however, the situation is entirely different. Here, Congress was faced with a constitutional provision vesting it with exclusive jurisdiction over maritime matters which it could not delegate to the States even if it so desired.[128] This distinction was fully appreciated by the Social Security Board when, in its *Report to the President,* in 1939, it stated:[129]

> "Under the Constitution it is impossible to confer upon the States jurisdiction over maritime employment, with the possible exception of that incidental to employment on land. Therefore, in order to afford unemployment compensation protection to seamen it would be necessary to pass a Federal Act."

In its opinion the Court of Appeals said:[130]

> "The legislative history and the judicial interpretation of the Federal statute amply demonstrate

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[128] *Knickerbocker Ice Co.* v. *Stewart, supra; Washington* v. *Dawson, supra,* notes 90 and 91.

[129] Report of the Social Security Board Recommending Changes in the Social Security Act, Document No. 110, 76th Congress, 1st Session (1939) p. 16.

See also: Hearings on Social Security Act Amendments, 1939, before House Committee on Ways and Means (76th Congress, 1st Session); and the statement of Arthur J. Altmeyer, Chairman of Social Security Board on H. R. 6635, [Hearings before Senate Committee on Finance, 76th Cong., 1st Sess. (1939), p. 30].

[130] R. 115.

> that it was not intended thereby to strait-jacket the states in the enactment of their own unemployment insurance laws. (See Senate Report, No. 628, Cal. No. 661, 74th Congress, p. 14; *Stewart Machine Co.* v. *Davis, supra,* at pp. 539, 594.) The conclusion is inescapable that Congress intended to leave to the states the widest possible latitude in setting up their unemployment compensation systems both as to the kind and extent of coverage provided. This broad policy may not be overridden by the exemptions contained in section 1607 (subd. c) (Par. 4)."

It is submitted that the legislative history of the Federal statute, rather than showing an intent to include maritime employment within the coverage of the State laws, indicates exactly the contrary.

No clearer pronouncement with respect to Congressional intent to exclude State coverage of maritime employment could be found than in the remarks made during the course of the House debate on the original Social Security Bill. During the course of such debate the following colloquy between Representatives Vinson and McCormack occurred:[131]

> "Mr. Vinson of Kentucky: *They* [*seamen*] *were exempted in unemployment insurance because there is no power under State law to collect the tax from them. They come under maritime or admiralty jurisdiction, and the State sovereigns have not the power to collect the taxes.*
>
> "Mr. McCormack: Seamen are exempted under the unemployment-compensation title [Title IX] because of Constitutional reasons that do not apply to the contributory annuities [Title VIII].
>
> Mr. Vinson of Kentucky: That is what I just said. They were exempted under Title VIII because of administrative difficulties."

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[131] Cong. Record, Vol. 79, Part 6, p. 5903; see also Note 129, *supra.*

In the Senate Report referred to in the opinion quoted above, the Committee on Finance said:[182]

> "There are good arguments to be made in favor of each of these types of unemployment compensation laws. In accordance with the entire spirit of the Social Security Act, we believe that the Federal Government should not attempt to dictate to the States which type of unemployment compensation law they should adopt. The amendment we suggest to the House Bill will eliminate all such dictation and leave the States free to decide for themselves *which type best suits their local conditions.*"

To fully appreciate the significance of this statement it must be read in the light of the provisions of the Social Security Act, which exempted officers and members of crews of vessels.[183] Since, as the above statement clearly indicates, the State laws were to operate "locally" and since the Social Security Act already exempted officers and members of crew of vessels, naturally, Congress had no objection to each State enacting an unemployment insurance law to suit its own particular conditions.

Significantly, while Senate Report No. 628 shows that the Senate proposed to amend H. R. 7260 (the Social Security Bill) by including maritime employment under title VIII (Old Age Benefits), no similar amendment was suggested with respect to Title IX (Unemployment Insurance) of the Bill which specifically excluded such unemployment.

We believe the conclusion is inescapable that Congress intended to reserve to itself the field of unemployment insurance for maritime labor. Such intention is evidenced,

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[182] Senate Report No. 628, Cal. No. 661 (74th Cong.), p. 14.

[183] 26 U. S. C. A. 1607 (c)(4), formerly Sec. 907 (c)(3) of Social Security Act, Appendix B.

not only by the recent legislative history of the Social Security Act, but also by the long history of Congressional enactments relating to employment and unemployment of maritime labor, beginning with the early days of the Republic.

POINT V.

THE CONSTITUTIONAL RULE REQUIRING NATIONAL UNIFORMITY WITH RESPECT TO THE LAWS APPLICABLE TO MARITIME EMPLOYMENT HAS A PECULIAR APPLICATION TO THE CASE OF SEAMEN.

It has been previously pointed out that Congress has legislated with respect to practically every phase of a seaman's rights. A seaman, in the course of his employment, travels the seas of the world, touching many American ports and many foreign ports. As a rule, he does not reside in any particular locality. His ship is his home. He may sign up in a port in a State which he may never, or rarely, visit again. The employment of a seaman and the incidents of that employment are not matters of the local concern of any State. The status of seamen is a national concern and the problem of caring for seamen from the social aspect is one that the States cannot adequately deal with.

A seaman may be employed for years by different ships and different employers, and the ships on which he sails may touch many American ports. If the employer of the seaman has to pay into the various State Unemployment Insurance Funds a percentage of the seaman's wages, such a seaman would acquire a right, in case he becomes unemployed, to be paid unemployment insurance by perhaps as many as ten or fifteen States. As a practical matter,

how is the seaman to find out, after a period of years, to which State he should apply, and why should the seaman be forced to secure his insurance, in case he becomes unemployed, in small bites from several different State Funds?

The period during which he must be unemployed in order to secure rights under a particular State Fund, or the amount that he is entitled to receive under the various State Funds, will vary to a considerable degree. In order to receive his just due, the seaman would probably have to engage a lawyer and an accountant, and this might not do him much good, because he would not have kept a record of his various employers or the ports at which their ships touched.

Obviously, the laws providing Unemployment Insurance for seamen should be uniform. It is a matter with which the Congress should deal. Any unemployment system for seamen must be harmonized with the doctrine of maintenance and cure.

There has been, of course, a good deal of criticism of the Admiralty rule of uniformity. Clearly, however, if there is any sense at all in the rule of uniformity, the rule should be applied in the case of a seaman. It is submitted that, in the interests of the seamen themselves, this Court should not approve a system of possibly forty-eight different laws providing Unemployment Insurance for seamen, depending for their application on some temporary voyage or employment from time to time.

In the light of the concern that Congress and the Courts have shown with respect to seamen, it is difficult to attribute to Congress an intention to permit the legislatures of the forty-eight States to pass conflicting laws affecting the vital rights of seamen.

Conclusion.

The appellant respectfully submits:

1. That the claimant herein was a member of the crew of a vessel operating on the navigable waters of the United States as a matter of law;

2. That, in so far as the New York Unemployment Insurance Law seeks to include within the term "employment", services performed by claimant herein and other employees of the appellant, in connection with the operation of its dredges on the navigable waters of the United States, said law is unconstitutional, null and void;

3. That, with respect to the regulation of maritime employment, Congress has already occupied the field to the exclusion of the States;

4. That Congress has expressly and by necessary implication denied to the States the right to include maritime employment for seamen within the coverage of their respective unemployment insurance laws;

5. That even if Congress had expressly authorized the States to include maritime employment for seamen within the coverage of their respective unemployment insurance laws, the States could not have constitutionally done so;

6. The status of seamen is a national concern and the problem of caring for them from the social aspect is one that the States cannot adequately deal with.

Accordingly, the decision and order of the Court of Appeals of the States of New York and the order of the Appellate Division of the New York Supreme Court, Third

Judicial Department made and entered the 22nd day of October, 1942, on the remittitur of said Court of Appeals, should be reversed.

Respectfully submitted,

CLETUS KEATING,
H. MAURICE FRIDLUND,
CHARLES S. CUNNINGHAM,
Counsel for Appellant.

Dated, April 27, 1943.

APPENDIX A.

Relevant Provisions.

New York Unemployment Insurance Law.

(New York Consolidated Laws, Chapter 31, Labor Law, Art. 18.)

§ 502. Definitions.

* * * * * *

1. "Employment", except where the context shows otherwise, means any employment under any contract of hire, express or implied, written or oral, including all contracts entered into by helpers and assistants of employees, whether paid by employer or employee, if employed with the knowledge actual or constructive of the employer [in which all or the greater portion of the work is to be performed within this state].

(1) The term "employment" shall include an individual's entire service, performed within or both within and without this state if: (a) the service is localized in this state; or (b) the service is not localized in any state but some of the service is performed in this state, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this state; or (ii) the base of operations or place from which such service is directed or controlled is not any state in which some part of the service is performed, but the individual's residence is in this state.

(2) Services performed within this state but not covered under paragraph (1) of this subdivision shall be deemed to be employment subject to this article if contributions are not required and paid with respect to such services under an unemployment compensation law of any other state or the federal government.

Note: Words in brackets above eliminated on March 27, 1941, N. Y. Laws, 1941, c. 169.

(3) Services not covered under paragraph (1) of this subdivision and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the federal government, shall be deemed to be employment subject to this article if the individual performing such services is a resident of this state and the commissioner approves the election of the employer for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this article.

(4) Service shall be deemed to be localized within the state if

(a) the service is performed entirely within the state; or (b) the service performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state, for example, is temporary or transitory in nature or consists of isolated transactions.

• • • • • •

§ 502-a. Federal instrumentalities.

1. Pursuant to the authority conferred by subsection (b) of section sixteen hundred and six of the federal unemployment tax act and in conformity therewith, any instrumentality of the United States (except such as are (A) wholly owned by the United States or (B) exempt from the tax imposed by section sixteen hundred of said act by virtue of any other provision of law), shall, beginning with January first, nineteen hundred forty, be subject, except as provided in section fifty-two hundred and forty of the revised statutes of the United States, as amended and as modified by subsection (c) of section sixteen hundred and six of said act, to all the provisions of this article.

• • • • • •

§ 503. Liability for payment of benefits.

• • • • • •

3. No employee shall be entitled to any benefits unless he

• • • • • •

(b) has, as provided in this article, registered as totally unemployed and reported for work or otherwise given notice of the continuance of his unemployment; and

(c) has been paid qualifying wages as provided in section five hundred five of this article in the base year which, in accordance with section five hundred and two, subdivision eight of this article, applies to the benefit year for which the claim for benefits is made.

• • • • • •

§ 515. Payment of contributions.

1. On and after the first day of January, nineteen hundred thirty-six, contributions shall be payable by each employer then subject to this article. Contributions shall become payable by any other employer on and after the date on which he becomes subject to this article.

• • • • • •

§ 516. Contributions to the unemployment insurance fund.

The contribution regularly payable by each employer shall be an amount equal to two and seven-tenths per centum of the payroll of employees, as herein defined,

• • • • • •

§ 518. Administration.

1. This article shall be administered by the commissioner and for such purpose he shall have power to make all rules and regulations and, subject to the regulations of the civil service, to appoint such officers and employees as may be necessary in the administration of this article. The commissioner may afford reasonable cooperation with

every agency of the United States charged with the administration of any unemployment compensation law.

2. The commissioner may create as many employment districts and may establish and maintain as many state employment offices as he deems necessary to carry out the provisions of this article. The commissioner is authorized to cooperate with or to enter into agreements with the federal railroad retirement board or any other agency of the United States charged with the administration of an unemployment compensation law, with any political subdivision of this state, or with any private non-profit organization, with respect to the establishment, maintenance, and use of free employment service facilities and free public employment offices, and as a part of any such agreement the commissioner may accept moneys, services, or quarters as a contribution to the special "employment service account" in the unemployment administration fund.

3. It shall be one of the purposes of this article to promote the regularization of employment in enterprises, localities, industries and the state. The commissioner shall take such steps as are within his means for the reduction and prevention of unemployment. To this end the commissioner may employ experts, and may carry on and publish the results of any investigations and research which he deems relevant, whether or not directly related to the other purposes and specific provisions of this article.

4. There is hereby created a state advisory council of nine members to be appointed by the governor. * * * The commissioner shall, in so far as practicable, consult the state advisory council on all matters of major policies and procedures involved in or connected with the administration of this article, and he shall inform the council of the action taken in connection with such matters. The state advisory council shall consider and shall advise the commissioner upon all matters connected with this article submitted to it by the commissioner and may recommend upon its own initiative such changes in the administration of

this article as it deems necessary. It shall have full investigatory powers, and shall have direct access to all sources of information. Beginning with July first, nineteen hundred thirty-nine, the state advisory council shall report quarter-annually to the governor and at least once in each year to the legislature.

The council shall investigate and study the operation of this article upon the basis of the actual contribution and benefit experience hereunder with a view to classifying or grouping employers, employments, occupations or industries with respect to the frequency and severity of unemployment of each, taking due account of any relevant and measurable factors relating thereto, and to report on the practicability of the establishment of a rating system which would most equitably operate to rate the unemployment risk and fix the contribution to such fund for each employer, group of employers, employment, occupation or industry and to encourage the stabilization of employment therein. In determining the establishment of such rating system it is hereby declared to be the public policy that no rate of contribution on payrolls required from any individual employer shall be less than one per centum. The council shall report its findings and recommendations to the governor and the legislature not later than March first, nineteen hundred forty.

• • • • • •

5. The commissioner may divide the state into such number of employment districts as he finds necessary and maintain a district office in each of said districts. The commissioner shall establish such number of local employment offices as he finds necessary, which offices, in addition to the other duties prescribed herein and by the commissioner, shall act as free public employment exchanges.

§ 529. Fund to be sole source of benefits under article; nonliability of state.

1. The unemployment insurance fund established by this article shall be the sole and exclusive source for the

payment of benefits payable hereunder and such benefits shall be deemed to be due and payable only to the extent that contributions, with increments thereon, actually collected and credited to the fund and not otherwise appropriated and/or allocated are available therefor. The state of New York undertakes the administration of such fund without any liability on the part of the state beyond the amount of moneys received through allotment from the federal social security board or other federal agency, except as provided in subdivision two of this section.

• • • • • •

§ 530. Hearings on disputed claims for benefits.

• • • • • •

2. When the initial determination of a claim for benefits, upon which a hearing has been requested pursuant to the provisions of this section, involves the question whether any person is or was an employer within the meaning of and subject to this article and is or was liable for the payment of the contributions imposed upon employers by this article, or the question whether an employer, as defined by this article, has fully complied with the obligations imposed upon employers by this article, written notice of the hearing shall be given to such person or employer, either personally or by mail, and thereupon he shall be deemed a party to this proceeding, entitled to be heard. Upon such notice having been given, the referee may then decide such question or questions and any other issue related thereto, and his decision shall not be deemed limited in its effect to the immediate employee making the claim for benefits, but shall be deemed a general determination of such questions with respect to all those employed by such person or employer for all the purposes of this article, and such decision shall be conclusive and binding upon him, subject, however, to the right of appeal hereinafter provided.

APPENDIX B.

Relevant Provisions,

Federal Unemployment Tax Act.

(Tit. 26 Internal Revenue Code)

§ 1606. Interstate commerce and federal instrumentalities.

(a) No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce.

(b) The legislature of any State may require any instrumentality of the United States (except such as are (A) wholly owned by the United States, or (B) exempt from the tax imposed by section 1600 by virtue of any other provision of law), and the individuals in its employ, to make contributions to an unemployment fund under a State unemployment compensation law approved by the Board under section 1603 and (except as provided in section 5240 of the Revised Statutes, as amended,[1] and as modified by subsection (c) of this section) to comply otherwise with such law. The permission granted in this subsection shall apply (1) only to the extent that no discrimination is made against such instrumentality, so that if the rate of contribution is uniform upon all other persons subject to such law on account of having individuals in their employ, and upon all employees of such persons, respectively, the contributions required of such instrumentality or the individuals in its employ shall not be at a greater rate than is required of such other persons and such employees, and if the rates are determined separately for different persons or classes of persons having individuals in their employ or for different classes of employees, the determination shall

[1] See sections 481-485 of Title 12, Banks and Banking.

be based solely upon unemployment experience and other factors bearing a direct relation to unemployment risk, and (2) only if such State law makes provision for the refund of any contributions required under such law from an instrumentality of the United States or its employees for any year in the event said State is not certified by the Board under section 1603 with respect to such year.

(c) Nothing contained in section 5240 of the Revised Statutes, as amended,[1] shall prevent any State from requiring any national banking association to render returns and reports relative to the association's employees, their remuneration and services, to the same extent that other persons are required to render like returns and reports under a State law requiring contributions to an unemployment fund. The Comptroller of the Currency shall, upon receipt of a copy of any such return or report of a national banking association from, and upon request of, any duly authorized official, body, or commission of a State, cause an examination of the correctness of such return or report to be made at the time of the next succeeding examination of such association, and shall thereupon transmit to such official, body, or commission a complete statement of his findings respecting the accuracy of such returns or reports.

(d) No person shall be relieved from compliance with a State unemployment compensation law on the ground that services were performed on land or premises owned, held, or possessed by the United States, and any State shall have full jurisdiction and power to enforce the provisions of such law to the same extent and with the same effect as though such place were not owned, held, or possessed by the United States. 53 Stat. 187, as amended Aug. 10, 1939, c. 666, Title VI, § 613, 53 Stat. 1391.

§ 1607. Definitions.

When used in this subchapter—

• • • • • •

[1] See sections 481-485 of Title 12, Banks and Banking.

(c) Employment. The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—

* * * * * *

(4) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

* * * * * *

APPENDIX C.

List of Draft Conventions Pertaining to Seamen Promulgated by International Labor Conference

Unemployment Indemnity in Consequence of Shipwreck (Series No. 8), Genoa, 1920; now ratified or embodied in legislation by over 29 nations, including Canada.

Employment or Hiring of Seamen (Series No. 9), Genoa, 1920; now ratified or embodied in legislation by over 28 nations, including Canada.

Minimum Age for Trimmers and Stokers (Series No. 15), Geneva, 1921; now ratified or embodied in legislation by over 31 nations, including Canada.

Medical Examination of Young Persons Working at Sea (Series No. 16), Geneva, 1921; now ratified or embodied in legislation by over 32 nations, including Canada.

Seamen's Articles of Agreement (Series No. 22), Geneva, 1926; now ratified or embodied in legislation by over 22 nations, including Canada and Mexico.

Repatriation of Seamen (Series No. 23), Geneva, 1926; now ratified or embodied in legislation by over 18 nations, including Canada and Mexico.

(1938 A. M. C., Vol. 2, p. 1321.)

Multilateral Convention relating to the Assistance to Seamen in the Treatment of Venereal Diseases.

(Benedict "On Admiralty", 6th Ed., Vol. 6, p. 282.)

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IN THE

Supreme Court of the United States

October Term, 1942.

No. 722.

STANDARD DREDGING CORPORATION,
Appellant,

vs.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and MIKE CASSARETAKIS.

BRIEF FOR INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, APPELLEE.

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BATAVIA TIMES, LAW PRINTERS,
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FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and MIKE CASSARETAKIS.

BRIEF FOR INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, APPELLEE.

Scope of this Brief.

The questions presented by this case, concerning the constitutionality and applicability of the New York Unemployment Insurance Law in respect to maritime workers, are substantially similar to those raised in the three other cases in which the Industrial Commissioner is an appellee, namely:

Matton Steamboat Co., Inc., and Conners Marine Co., Inc. v. Frieda S. Miller, as Industrial Commissioner, etc. and James R. Knowlson—October Term, 1942, No. 783.

International Elevating Company v. Frieda S. Miller as Industrial Commissioner, etc. and Joseph Bergen —October Term, 1942, No. 723.

Lake Tankers Corporation v. Frieda S. Miller as Industrial Commissioner, etc. and Jamel Sheredos— October Term, 1942, No. 813.

Our main brief in No. 783 not only sets forth our contentions in respect to the primary issues of constitutionality and interpretation in this case but also deals with the counter-arguments advanced in all four of the cases. We submit a short separate brief in this case in order to deal with matters peculiar to the case at bar.

Opinions Below.

The opinion of the Court of Appeals of the State of New York (R. 107-115) is reported in 289 N. Y. 119, and reversed the decision of the Appellate Division of the Supreme Court of the State of New York, Third Department (R. 104-105), reported in 263 App. Div. 773, which rendered no opinion.

Jurisdiction.

The jurisdiction of this Court is invoked under §237, as amended, of the Judicial Code (28 U. S. C. A. §344).

Questions Presented.

The questions presented on the merits of this appeal are (1) whether claimant was a "member of the crew", (2) whether the application of the New York Unemploy-

ment Insurance Law to one engaged in maritime employment within the State of New York contravenes Article III, §2, of the United States Constitution and, (3) if not, whether Congress has affirmatively acted so as to deprive the State of jurisdiction to tax maritime employees.

Statement.

Appellant's statement of facts requires to be supplemented.

The findings of fact are contained in the referee's decision (R. 5-9), and have been affirmed by the Unemployment Insurance Appeal Board (R. 2-3) and by the Court of Appeals (R. 108).

Appellee Cassaretakis (hereinafter referred to as "claimant") worked aboard the dredge "Miami" from March 15 to August 15, 1939, employed by Standard Dredging Corp., Appellant. The Standard Dredging Corp. of New York, during the period March 15 to August 15, 1939, was engaged in operating the dredge "Miami" in Gravesend Bay, which is adjacent to the Borough of Brooklyn, City of New York. *It had a contract with the City of New York, Park Department, to pump material from beneath the surface of Gravesend Bay on to the land in order to fill in the shoreline and create an addition to the public highway under the jurisdiction of the Park Department.* The dredge was non-self-propelled, but moved from spot to spot in the vicinity of its operations by means of cables or spuds.

Appellant's brief (p. 6) states that the "Miami" "is a seagoing dredge, which after completing the Gravesend Bay job, made the voyage to Jacksonville, Florida, * * *." This

statement is at best a half-truth. The record shows that the only way the "Miami" "made the voyage" to Jacksonville, Florida, was by being *towed* from Gravesend Bay (R. 24).

The material excavated from underneath the waters was conveyed to land by means of pipe lines attached to the dredge, and which rested upon pontoons spaced between the dredge and the shore (R. 6).

A superintendent was in charge of the workers aboard the dredge, and although maritime titles were applied to those positions, the description of the work seems to indicate that their labors were principally with the operation of the dredging machinery and engines, as well as the incidental work connected therewith (R. 6).

Claimant's work was that of assistant cook, dishwasher and waiter, taking care of the feeding requirements of the personnel of the dredge. He slept aboard the dredge. During the last few weeks of his employment he served as a watchman while the dredge was out of operation and tied up (R. 6).

The work of the dredge in this particular instance was definitely in connection with the construction of a highway on land. It carried no cargo nor passengers. It definitely was not engaged in the general work of navigation. The personnel aboard the dredge were not reqnired to be licensed by any Federal agency (R. 7).

Unlike Knowlson, Appellee in No. 783, Appellee Cassaretakis was not a member of the crew of the dredge.

Statute Involved.

The statute involved is the New York Unemployment Insurance Law[1] (Labor Law §§500 *et seq.*). The pertinent sections of the statute in force during 1939 are annexed as an appendix to our main brief, No. 783. No question concerning the construction of the statute, as distinguished from its constitutionality as construed, is present in this case, since the holding of the Court of Appeals that it applies to the particular maritime worker is binding as a decision of state law.

> "The construction given to a statute of a State by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text." (*Leffingwell v. Warren*, 2 Black, 599, 603.)

See, also:

Lloyd v. Matthews, 155 U. S. 222;
Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U. S. 673.

The reference which appellant makes (Brief, pp. 14, 15; see also Brief in No. 783, p. 6) to an early opinion of the New York Attorney General (1936 Op. Atty. Gen. 268), which was based entirely upon the supposed compulsion of the *Knickerbocker*[2] and *Dawson*[3] cases, is therefore of no present significance.

No question of inequity exists by reason of the Court of Appeals' reversal of the Attorney General's 1936 opinion, because the legislature has provided that no taxes shall

[1] L. 1935 c. 468 and as amended, effective June 3, 1939 by L. 1939 c. 662.
[2] 253 U. S. 149.
[3] 264 U. S. 219.

be collected in respect of wages paid prior to January 1, 1942 to officers or members of crews of vessels (N. Y. Laws 1943, c. 454). The claimant's right to unemployment benefits, which gave rise to this proceeding, has not been affected, however.

Summary of Argument.

The main points of law involved in this appeal are argued by us in companion case No. 783 (*Matton Steamboat Co., Inc. and Conners Marine Co., Inc. v. Frieda S. Miller, as Industrial Commissioner of the State of New York, and James R. Knowlson*). An additional point peculiar to this appeal is contained in Point V herein, namely:

POINT V.

Since Cassaretakis was not a member of the crew, the Federal Unemployment Tax Act exempting from the Federal Tax Service performed as an officer or member of the crew of a vessel is not applicable, and appellant is left with the sole argument that the State law contravenes Article III, § 2, of the Federal Constitution.

The Appeal Board affirmed the decision of the Referee (R. 3) that Cassaretakis was not a member of the crew (R. 8). The Court of Appeals in turn found that the employment of Cassaretakis "may be deemed incidental to construction and stevedoring operations, respectively, rather than to navigation," and held that Cassaretakis, although concededly engaged in general maritime employment, was not a member of the crew of a vessel on the navigable waters of the United States (R. 109). To substantiate such a finding of fact, the record discloses that Cassaretakis suited

his own convenience when he slept on board. The following testimony appears in the record (R. 14):

Q. Did you sleep at home?
A. Lots of times I go home.
Q. Did they have a place on board for you to sleep?
A. I can sleep there if I want to stay.
Q. Did you sleep aboard the dredge?
A. Yes. If I want to sleep there I can sleep there all the time.

Claimant testified that he did not have to have any certificate or license to work on board the dredge, nor did he have any seaman's papers (R. 18). When the appellant's witness, Mr. George F. Gee, was asked how the dredge was moved, he replied: "With tow boats. The Moran Towing Company" (R. 52). The witness further testified that the dredge "Miami" was not a propelled vessel (R. 60); that the dredge was not built for being a self-propelled vessel but was adaptable to go to sea and to be towed by another propelled vessel (R. 61).

The dredge carried only 25 to 30 men while being towed between locations, although it required a crew of 42 to 50 men, when it was engaged in actual dredging operations (Appellant's Brief, p. 17). In fact a crew of 12 was adequate to satisfy the navigation requirements in its "consolidated certificate of enrollment" (Ex. B, R. 27, 90A). Obviously in a crew of 12 there would be no need for a cook's helper. Even assuming that a cook on a dredge while it was being towed to the scene of new operations might be regarded as having some part in navigation, the court could properly find that a cook's helper was necessary only when additional workers were required for dredging in a particular locality. In other words, the claimant here was employed for the purpose of assisting in the

dredging of material to be deposited on shore and not for the navigation of the ship. The test of whether a worker is a member of the crew of a vessel is whether he is "naturally and primarily on board to aid in her navigation" (*South Chicago Coal and Dock Co. v. Bassett*, 309 U. S. 251, 260).

In our main brief, No. 783, where Appellee Knowlson was a member of the crew, under Point IV, we argue that the State had not been ousted of its jurisdiction because of the fact that Congress had seen fit to exempt from the provisions of the Federal Unemployment Tax Act service performed as an officer or member of the crew. There Knowlson was concededly a member of the crew. In this case, however, the Court of Appeals has approved the finding of fact herein that Cassaretakis was not a member of the crew (R. 109). It must, therefore, of necessity, logically follow that the arguments of appellant concerning the legal effect of the federal exemption have no application to the instant case where Cassaretakis was not a member of the crew.

The Federal Unemployment Tax Act, in exempting services performed by an officer or member of the crew did not thereby exempt the services of all seamen. It has been held by this Court that the terms "master" or "member of a crew" are more limited than the term "seaman" (*South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, at 257, where the Courts also cited *International Stevedoring Co. v. Haverty*, 272 U. S. 50, and *Northern Coal Co. v. Strand*, 278 U. S. 142). In the same case this Court overruled the contention of the petitioner that a question of law was involved, and held that whether an employee is, or is not, a member of a crew turns on a question of fact, and if there is

evidence to support the finding, it is conclusive (*ibid.* at p. 257).

Appellant cites a number of cases in the lower Federal courts to the effect that a cook on various types of vessel (not including a dredge) is a member of the crew; and additional cases to the effect that a dredge is a "vessel" for certain purposes. The conclusion which appellant seeks to draw, that a cook's helper on a dredge must, as a matter of law, be held to be a member of the crew, is clearly a *non sequitur*. As this court stated in the *Bassett* case (309 U. S. at 258, 260-261):

> "The word 'crew' does not have an absolutely unvarying legal significance."
>
> "Even if it could be said that the evidence permitted conflicting inferences, we think that there was enough to sustain the deputy commissioner's ruling."

We believe the Court of Appeals correctly disposed of this matter when it decided:

> "whether or not an individual is a member of a crew of a vessel on the navigable waters of the United States presents primarily a question of fact which turns generally on whether the individual serves the ship in her navigation. (*South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, 259.) In consequence the determination of the Appeal Board, if sustained by substantial evidence, is conclusive upon the courts. (Labor Law, art. 18, §534; *Matter of Morton*, 284 N. Y. 167.) Upon this record there is substantial evidence to sustain the findings of fact in this regard of the Appeal Board * * * Cassaretakis was assistant cook on board a dredge which was employed in a land filling operation in connection with the construction of a public highway. Bergen was a grain-trimmer on a floating grain elevator, his work being in connection with transfer of grain from one barge to another for purposes of further transportation. The employment of these two latter

claimants, therefore, may be deemed incidental to construction and stevedoring operations, respectively, rather than to navigation. In consequence, Cassaretakis and Bergen, although concededly engaged in general maritime employment, were not members of crews of vessels on the navigable waters of the United States * * *" (R. 108-109).

We have proved in our main brief, No. 783, under Points II and III that the State law does not contravene the Federal Constitution (Article III, §2), and that the provisions of the Federal Unemployment Tax Act exempting the service of an officer or member of the crew from the Federal tax imposed by that statute do not oust the State from jurisdiction.

Only in the event therefore that this Court holds that the Federal constitution prevents the exercise of the State's jurisdiction will it be necessary to consider the application of the "locality doctrine" in support of the order appealed from.

Examining the situation solely upon the basis of the "locality doctrine," without thereby conceding the necessity of its application, then surely the record herein reveals that the appellant was engaged in a matter purely of local concern. The City of New York was engaged in improving its system of parks. It is difficult to think of any situation more local in character than such an activity. There was nothing inherent in the nature of the work of Cassaretakis to make it navigational in character. Rather, as we have shown, it was incidental to construction and stevedoring operations. During his working hours, the dredge was working from a fixed location. Among other things, when his work was over he was free to suit his own convenience whether to sleep on the dredge or go ashore for the night.

A tax based upon his employment is purely a local matter, in no way prejudicing the general uniformity of the maritime law.

CONCLUSION.

The Order Appealed From Should be Affirmed.

Dated: Albany, N. Y., April 28, 1943.

Respectfully submitted,

NATHANIEL L. GOLDSTEIN,
Attorney General, State of New York.

Of Counsel
ORRIN G. JUDD,
Solicitor General, State of New York.

WILLIAM GERARD RYAN,
FRANCIS R. CURRAN,
Assistant Attorneys General.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1942.

No. 722.

STANDARD DREDGING CORPORATION,
Appellant,

v.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and MIKE CASSARETAKIS.

BRIEF OF APPELLEE STATE INDUSTRIAL COMMISSIONER IN ANSWER TO BRIEF OF GULF OIL CORPORATION, AS AMICUS CURIAE.

NATHANIEL L. GOLDSTEIN,
Attorney General, State of New York.

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BATAVIA TIMES LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

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STANDARD DREDGING CORPORATION,
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FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and MIKE CASSARETAKIS.

BRIEF OF APPELLEE STATE INDUSTRIAL COMMISSIONER IN ANSWER TO BRIEF OF GULF OIL CORPORATION, AS AMICUS CURIAE.

The Facts Stated in the Gulf Oil Corporation Brief Involve a Situation Not Presented by the Cases Before this Court.

The brief submitted on behalf of Gulf Oil Corporation deals with facts very much different from those presented in any of the appeals that were argued before this Court—facts on which the New York Court of Appeals has not yet been called upon to express an opinion.

For instance, the second paragraph of the brief states (p. 4) that "New York's Unemployment Insurance Law has

the broadest extraterritorial effect," and it asserts that an employer is required under the New York law to make contributions to the state fund for services of an employee without the state as well as those performed within the state "even though he works only one day in New York and the rest of the time on the high seas or in another state." No decision of the New York courts, or even of the referees in the Division of Placement and Unemployment Insurance, is cited to support these contentions. In the above entitled appeal (Cassaretakis—No. 722), the claimant worked in New Jersey and New York and the dredge on which he had worked was later towed to Florida; yet the only service for which he was allowed benefits was the service in New York.

Surely the New York statute should not be condemned on the basis of its possible application to a hypothetical state of facts which is not before the Court where the precise application of the statute thereto cannot have been as thoroughly canvassed by the state court as the situations which were argued before the Court on May 5, 1943, and in fact has not been canvassed at all.

Moreover, as pointed out on the oral argument, the "turmoil" which Gulf Oil Corporation foresees arises not from the maritime character of its work but from its interstate character, a circumstance which does not constitute a ground for exemption from the Federal Act (Internal Revenue Code, § 1606(a)). Problems just as serious might be imagined with respect to interstate bus lines, interstate trucking lines, airplane companies and (prior to 1939) railroad companies; yet no interpretations of any State law seem to have been so burdensome or duplicative as to require court action during the seven years that the Unemployment Insurance Laws have been in effect.

Gulf Oil Corporation states (p. 5) that "multiple taxation was actually imposed" in the Bergen case, citing the Reply Brief in No. 723. This statement is incorrect for a number of reasons. In the first place, the decision in the *Bergen* case did not impose a tax, but simply recognized the claimant's right to unemployment benefits payable by the State of New York. In the second place, there has not been any determination that taxes are payable to New Jersey in respect of the employment for which claimant was awarded benefits by New York. The claim is based on a decision of a New Jersey Referee, which was rendered long before the original brief in No. 723, and which is presently on appeal. The New Jersey case relates to different years, and it nowhere appears that it involves the particular boat on which Bergen, the claimant in No. 723, was employed. The facts concerning the place of service of that boat are set forth at page 50 of the Record in No. 723. It also appears from the record in that case (R. 28) that the company has customarily been segregating its assets for the purpose of New York franchise tax; it should be able to do so equally for unemployment tax purposes. New York recognizes the principle that extra-territorial values should not be taxed (*People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N. Y. 48; *cf. Gwin v. Hemeford*, 305 U. S. 434); and there is no reason for invalidating the New York statute simply because of the possibility of its being applied in a manner to create double taxation. The claim of double taxation does not affect Nos. 722 or 783, and in any event arises not from the maritime character of the work but from its interstate character. Claimant in No. 723 was not a member of the crew of a vessel; and appellant in that case has withdrawn the assignments of error based on the ruling that claimant was not a member of the crew (Appit's brief in No. 723, p. 8-n).

The years in question in the cases before this Court are 1938 and 1939. The brief of Gulf Oil Corporation, however, complains (p. 6) of the fact that the New York statute which was construed in these cases, and which covered only employment where "the whole or greater part of the contract of employment is performed within this state" was amended in 1941. It is noteworthy in this connection that the change in the language respecting coverage of the statute was designed to conform to the model state law proposed by the Social Security Board.

I.

The New York Unemployment Insurance Law does not regulate the employment of seamen.

The first point of the argument in Gulf Oil Corporation's brief is based upon the theory that New York is attempting "regulation." As pointed out in our briefs and argument, the New York statute is a taxing statute and not a regulating statute.

The case of *People v. Compagnie Generale Transatlantique,* 107 U. S. 59, cited under that point (Brief, p. 7), did not relate to a non-discriminatory tax, but to a duty levied only on the admission of alien passengers at the port of New York, which was designed to exclude certain classes of aliens. *Henderson v. Mayor,* 92 U. S. 259, was similar.

II.

Congress has not occupied the field.

Gulf Oil Corporation's brief states in its second point that "Congress has occupied this particular field *of inter-*

state and foreign commerce • • •'' (p. 7—italics ours.) Again an erroneous theory is involved, for Congress has expressly provided that employers are not exempt from any tax because it impinges on ''interstate or foreign commerce'' (Internal Revenue Code § 1606(a)).

III.

Congress has not exempted officers and members of crews of vessels from state taxation.

The third point in Gulf Oil Corporation's brief deals largely with the subject matter covered in Point IV of our brief in No. 783. That argument need not be repeated here, but we desire to add a few words with reference to one of the cases cited by Gulf Oil Corporation, namely, *McGoldrick v. Gulf Oil Corporation,* 309 U. S. 414. This case was decided on the ground of a Congressional policy that petroleum, imported in bond and sold, after processing, to foreign vessels as ships' stores, should not become part of the common mass of taxable property within the state (see p. 429). For the reasons set forth in our brief in No. 783 (pp. 49-60), we ask this Court to find that there was no similar Congressional policy of exempting service as officers and members of crews from state taxation.

IV.

The contention that the Court of Appeals misconstrued the New York statute is inadmissible.

The fourth point in Gulf Oil Corporation's brief is based upon the 1936 opinion of the New York Attorney General. Such opinion did not constitute an administrative interpre-

tation of the Act. It merely represented the view which the New York Attorney General then entertained respecting this Court's decisions in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, and *Washington v. Dawson*, 264 U. S. 219. If the view was sound, the legislature could do nothing to change the interpretation of the statute. What was stated in Brown, Regulations, Reenactment and the Revenue Acts (54 Harv. L. Rev. 377, at 390, cited at p. 12 of the Gulf Oil brief) is pertinent here, that "administrative rulings which have been coerced, or were supposedly required, by court • • • decisions, are of little authority." But clearly the early views of the Attorney General concerning the *Jensen* line of cases were not binding upon the Court of Appeals with respect to the interpretation of the New York statute; and no reason is advanced in Gulf Oil Corporation's brief why judicial reversal of even "a contemporaneous and long-continued executive construction" (heading, Brief, p. 11) raises any questions under the Federal Constitution—especially in the light of Chapter 454 of the New York Laws of 1942, referred to at page 6 of our brief in No. 783.

It should also be mentioned that Cassaretakis was not a member of the crew of a vessel, and consequently that his services were not excluded from the term "employment" under either the Federal Act or the New York Act as originally limited.

To support its contention that the Federal and State Acts should be co-extensive, Gulf Oil Corporation argues (Brief, p. 13) that "unemployment" must mean lack of the "employment" defined in the Federal act. If this were so, a worker in covered "employment" who shifted to a job in a concern which had less than eight workers, and there-

fore was not covered by the Federal Act, would be entitled to "unemployment" benefits, even though actually working. Congress surely never had any such intention.

Conclusion.

The decision appealed from should be affirmed.

Dated: May 12, 1943.

Respectfully submitted,

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Attorney General of the State of New York,
Attorney for Industrial Commissioner.

ORRIN G. JUDD,
Solicitor General,
WILLIAM GERARD RYAN,
FRANCIS R. CURRAN,
Assistant Attorneys General,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 722.

STANDARD DREDGING CORPORATION,
Appellant,

v.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and MIKE CASSARETAKIS.

MOTION OF GULF OIL CORPORATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*.

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THE COURT PRESS, N. Y. C.

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unemployment system fostered by the Federal Social Security Act; in other words, such an application of the New York law would constitute an infringement of the congressional regulation of interstate and foreign commerce inherent in the exclusion of such employees from the national, and consequently from the intended coterminous state, unemployment insurance scheme 8

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 722.

STANDARD DREDGING CORPORATION,
Appellant,

v.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and MIKE CASSARETAKIS.

Motion for Leave to File Brief as *Amicus Curiae*.

May It Please the Court:

Upon the annexed consent of all real parties in interest in this case, the undersigned, as counsel for Gulf Oil Corporation, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *Amicus Curiae*.

MATTHEW S. GIBSON,
Counsel for Gulf Oil Corporation
as *Amicus Curiae*.

Consent to File Brief as *Amicus Curiae*.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. 722.

STANDARD DREDGING CORPORATION,
Appellant,

v.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and MIKE CASSARETAKIS.

It is hereby consented that Gulf Oil Corporation may file and serve herein a brief as *Amicus Curiae*, it being stipulated and agreed as a part of this consent that the appellee Frieda S. Miller may, and the parties respectfully move this Honorable Court that she may, have a reasonable time thereafter within which to file and serve a brief in answer to said brief of Gulf Oil Corporation.

Dated, New York, New York, May 10, 1943.

(sg) CLETUS KEATING,
Counsel for Appellant.

(sg) ORRIN JUDD,
Solicitor General of the State
of New York,
Counsel for Appellee, Frieda S. Miller.

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 722.

STANDARD DREDGING CORPORATION,
Appellant,

v.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and MIKE CASSARETAKIS.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT.

BRIEF OF GULF OIL CORPORATION AS *AMICUS CURIAE.*

Statement.

Gulf Oil Corporation operates many vessels which enter the State of New York, and the General Manager of its Marine Department has his office in New York. Its home office and principal place of business is in Pittsburgh, Pennsylvania and it has branch offices of its Marine Department in several states.

Facts.

The brief for the appellant gives a satisfactory statement of the facts. We wish to emphasize the turmoil into which the accounts and business of ship owners such as Gulf Oil Corporation will be thrown, and the additional burdens and discriminations that will be imposed upon them, if this Court affirms the decision below. New York's Unemployment Insurance Law has the broadest extra-territorial effect. If the place from which the service of a seaman of a vessel on the navigable waters of the United States is "directed or controlled" is held by the New York State Department of Labor to be in New York, or if the "base of operations" is held to be in New York, then his employer must make the contributions to the state unemployment insurance fund on his wages, not just for the service he may have performed, in New York, but for his "entire service", including that performed without the state (Appellant's Brief, p. 47). This is true even though he works only one day in New York and the rest of the time on the high seas or in another state.

Vessels plying the inland waterways and those in the coastwise trade may pass through many states. Some states have unemployment insurance laws that apply to an employee's entire wages if he works more than half the time in such states. If the services of seamen on such vessels are directed from a place in New York, and they perform some services in that state, the employer might well be subjected to multiple, and, hence, discriminatory taxation, besides the burden of keeping track of the number of hours each seaman works in each state. A voyage from New

York to Boston through Long Island Sound, for example, passes through New York, Connecticut, Rhode Island, and Massachusetts. The Court will take judicial notice of the fact that stops at intermediate points in the different states, for the purpose of taking on and discharging cargo or making repairs, would render the vessel operator's burden of complying with the different unemployment insurance laws intolerable. Each state has different rules, regulations, and forms. Some have the "merit" system, while others have not adopted it. And the rates differ. States with laws similar to New York's might reasonably claim that the "base of operations" was not in New York but in such other states. Two or three states might reasonably claim the tax on the entire services of a seaman for the same period by asserting that either the "base of operations" or the place from which the service is "directed or controlled" is in each state. For example, the ship's agent might be in one state, the manager of the company in another, and the home office in a third state. Each might, with apparent propriety, claim the tax on the seaman's entire wages, if he worked any time in such state. In fact such multiple taxation was actually imposed upon the appellant in *International Elevating Co.* v. *Miller*, No. 723, Oct. Term 1942, a companion case now before this court (See appellant's reply brief therein).

A perusal of the charts comparing the different state unemployment insurance laws, set forth in the C. C. H. Unemployment Insurance Service, paragraphs 989-994-A, would have dispelled the notion of Finch, *J.*, in the Court below, that the difficulties described above are unreal and imaginary. Moreover, his notion that these difficulties were "conjured up" was expressly predicated on an erroneous state-

ment of the extra-territorial coverage of the Unemployment Insurance Law of New York; for the provision on which he based such notion was to the effect that the law "is applicable only when the whole or the greater part of the contract of employment is performed within this state," and that provision was deleted from the statute in 1941 (Appellant's Brief, p. 47) and is now no longer in the law. There is no provision for apportioning the tax to that part of the interstate and foreign commerce activities which are carried on in New York. Even if there were such apportionment the administrative burdens outlined above would not be lightened,—rather would they be increased.

Argument.

Such confusion and burdens and discriminations as those shown above must have been in the minds of the members of the National Legislature when they excluded officers and members of the crews of vessels on the navigable waters of the United States from the coverage of the Federal Unemployment Tax Act. Certainly the framers of the Constitution had such considerations in mind when they gave Congress exclusive and plenary power to regulate interstate and foreign commerce (Article 1, Section 8, Clause 3) and extended the judicial power of the United States to "all cases of admiralty and maritime jurisdiction".

We subscribe to the treatment of this problem as presented in Appellant's Brief. Our purpose here is to present the matter in a different light and to make certain points which we think appellant omitted for the sake of brevity.

POINT I.

Regulation such as that being attempted here by the State of New York is inherently a subject of national, and not of local, concern, and is therefore a subject that demands uniformity of regulation; and this attempt by the State so to regulate the employment of seamen would be an altogether inadmissible regulation of interstate and foreign commerce, even in the absence of the federal action in excluding seamen from the coverage of the federal act, for the reason that the Constitution itself occupies this field. (Art. 6, Cl. 2 (Supreme Law); Art. 1, Sec. 8, Cl. 3 (Commerce Clause); Art. 3, Sec. 2 (Maritime Jurisdiction).)

Henderson v. *Mayor of New York,* 92 U. S. 259, 273-275 (1876);
People v. *Compagnie Generale Transatlantique,* 107 U. S. 59, 63 (1883);

and cases cited in Appellant's Brief.

POINT II.

Congress has occupied this particular field of interstate and foreign commerce to the exclusion of this state tax and regulation. (Art. 6, Cl. 2 (Supreme Law); Art. 1, Sec. 8, Cl. 3 (Commerce Clause); Art. 3, Sec. 2 (Maritime Jurisdiction) of the Federal Constitution.)

This argument is apposite only in those cases where the states *may act* in the absence of federal legisla-

tion, but where there has been federal action covering the same field. It is usually not adopted by the Court when (as we maintain is the case here) the subject is clearly one of national as opposed to local concern (Point I above). *Kelly* v. *Washington*, 302 U. S. 1, 14, 15 (1937), and cases there cited.

But the two points are not mutually exclusive: this is both a subject of national concern and one that has been comprehensively regulated by Congress, as the brief of the appellant so aptly demonstrates. In this respect this case is parallel to *People* v. *Compagnie Generale Transatlantique*, 107 U. S. 59, 63 (1883).

POINT III.

The application of the New York Unemployment Compensation Law to employers of officers and members of crews of vessels on the navigable waters of the United States is in direct conflict with and would wholly frustrate the express regulation of Congress, which, acting within its province in the exercise of its plenary and exclusive power to regulate interstate and foreign commerce, has adopted the national policy of keeping this class of employers, for the time being, outside the scope of the nationwide unemployment system fostered by the Federal Social Security Act; in other words, such an application of the New York law would constitute an infringement of the congressional regulation of interstate and foreign commerce inherent in the exclusion of such employees from the national, and consequently from the intended coterminous state, unemployment insurance scheme. (Art. 6, Cl. 2 (Supreme Law); Art. 1, Sec.

8, Cl. 3 (Commerce Clause); Art. 3, Sec. 2 (Maritime Jurisdiction); Art. 1, Sec. 8, Cl. 18 (General Power) of the Federal Constitution.)

The arguments (1) that this is a subject of national character and (2) that Congress has occupied this field to the exclusion of this local tax and regulation (Points I and II, above) would ordinarily presuppose the absence of a direct conflict between this local law and any Congressional regulation; but we respectfully maintain that not only is this a field of national concern, which has been completely occupied and regulated by the Congress, but also that the state tax and regulation here attempted would obviously nullify an express regulation by the Congress. *McGoldrick* v. *Gulf Oil Corporation,* 309 U. S. 414, 428, 429 (1940), and cases cited. There, Congress, in the exercise of its commerce power, had exempted the subject matter from its tax regulation. The same is true here. In that case there was no express prohibition of a like tax regulation by the states. But this Court held that such prohibition was necessarily implied because Congress's express exemption amounted to a regulation and evidenced its clear intention that the subject be left unregulated and unburdened by the states.

See SALES TAXES, INTERSTATE TRADE BARRIERS, AND CONGRESS: THE GULF OIL CASE, by M. R. Schlesinger, 39 Michigan Law Review No. 5, March, 1941, pages 755, 779, 780, 781.

In this case there is an implied but none the less positive Congressional prohibition against the state tax regulation here involved. Such prohibition is inherent in the whole Federal-State unemployment

insurance system, since, as appellant points out, the intention of Congress was that the state and federal acts be coterminous in scope. *Buckstaff Co.* v. *McKinley,* 308 U. S. 358, appellant's brief, pages 37, 38.

We respectfully maintain, to paraphrase a statement in the dissenting opinion in *McCarrol* v. *Dixie Greyhound Lines, Inc.,* 309 U. S. 176 (1940), that Congress, unconfined by the "narrow scope of judicial proceedings", has found, in the exercise of its plenary constitutional control over interstate and foreign commerce, that to bring seamen into the special Federal-State statutory system of unemployment insurance would not be consistent with the best interests of our national economy, and, on the basis of a full exploration of all aspects of the problem, has devised a national policy excluding seamen from such system. For New York to bring them back into the system would contravene this indubitable intention of Congress, and would therefore be contrary to the supreme law of the land.

The federal permission to bring interstate and foreign commerce activities within the scope of state unemployment insurance acts (Appellant's Brief, p. 39) applies to bus and truck drivers, telegraph and telephone operators, freight forwarders, traveling salesmen who take interstate orders, and the like; but the one field of interstate and foreign commerce not embraced within such permission is that of *maritime employment,*—for it is expressly excluded from the term "employment" by the federal act. (Section 1607 of the Federal Act, Appellant's Brief, p. 55). The act does not define "unemployment"; but obviously it means lacking the "employment" as defined in the act. So, the federal act, in setting up the

system and forcing it upon all forty-eight states by economic pressure, and in referring to state laws as "unemployment" insurance laws, intended such term to mean lack of the "employment" defined in the federal act. It was clearly the intention of Congress that all states should adopt such system and that each state should provide the same coverage, or at least not go beyond the coverage of the federal act, in order to prevent inequalities among the states, which might induce migration of industry or of workers. And the uniform or maximum coverage intended by Congress could only be that provided by the federal act itself.

POINT IV.

In this case the state is wrongfully endeavoring to change retroactively a contemporaneous and long-continued executive construction of the apparently ambiguous unemployment insurance statute to the detriment of employers who acted in reliance thereon for several years, during which time the legislature has amended the law in other respects and has thereby adopted such construction; and the Social Security Board has adopted it by giving its approval to the law as so construed.

See pages 14 and 15 of appellant's brief for reference to an opinion rendered by the Attorney General of New York in 1936, to the effect that officers and members of crews of vessels are not covered by the New York law (L. 1935, Ch. 468).

Davis v. *Manry* (1925), 266 U. S. 401, 45 S. Ct. 163, 69 L. Ed. 350;

United States v. *Cerecedo Hermanos y Compania,* 209 U. S. 337;

United States v. *Alabama Great Southern Railroad Co.,* 142 U. S. 615, 12 Sup. Ct. 306, 35 L. Ed. 1134 (1892);

Griswold's "A Summary of the Regulations Problem", 54 Harv. L. Rev. 398;

Brown's "Regulations and Reenactment", 54 Harv. L. Rev. 378;

Waterbury Savings Bank v. *Danaher* (1941) 128 Conn. 78, 20 A. 2d 455;

Hadden v. *South Carolina Tax Commission,* 190 S. E. 249, 253, 183 S. C. 38 (1937);

State v. *Equitable Life Assur. Soc.,* 282 N. W. 411, 68 N. D. 641;

Massachusetts Protective Assn. v. *United States,* 114 F. 2d 304, 313, 314 (C. C. A. 1st, Aug. 6, 1940);

Commissioner of Internal Revenue v. *Monarch Life Ins. Co.,* 114 F. 2d 314, 323 (C. C. A. 1st Aug. 15, 1940);

Armitage v. *B'd of Education of City of Auburn,* 203 N. Y. S. 325, 122 Misc. 586, Affd. 205 N. Y. S. 910, 210 App. Div. 812, affd. 148 N. E. 699, 240 N. Y. 548;

Duke Power Co. v. *South Carolina Tax Commission,* 81 Fed. 2d 513, 520;

Chattanooga Plow Co. v. *Hays,* 125 Tenn. 148, 140 S. W. 1068, 1069;

Douglas County v. *Vinsonhaler,* 82 Neb. 810, 118 N. W. 1058, 1063-1064;

United States v. *Chicago, St. P. M. & O. Ry. Co.* (C. C. A. 8th, 1930), 43 F. (2d) 300, 305-306, 71 A. L. R. 507.

This is not a simple isolated question of the proper construction to be placed upon a state statute. It is inextricably interwoven with and colored by the intention of Congress in setting up the Federal-State unemployment insurance system and defining the scope thereof.

The Social Security Board, which has always had the power to withdraw its approval of the New York Unemployment Insurance Law, and thereby to prevent New York employers from receiving credit of up to 90% of the federal tax for the contributions under the New York law (Internal Revenue Code, Sections 1603 and 1601), should be presumed to have had knowledge of the above contemporaneous and long-continued executive construction of the New York law by the chief law officer of the state; and the Board should be presumed to have approved such construction by continuing to approve the law as so construed since 1936.

One of the conditions of the Board's approval of a state act is that "*All* money withdrawn from the unemployment fund of the State shall be used solely in the payment of *unemployment* compensation * * *" (Emphasis ours. Internal Revenue Code, Section 1603 (a) (4)) "Unemployment" under that provision certainly means lack of the "employment" as defined and limited by Section 1607 of the Code. Since the service performed as an officer or member of the crew of a vessel on the navigable waters of the United States is not "employment" as so defined, a loss of such service by the employee is not the "unemployment" mentioned in Section 1603 (a) (4), and, hence, it would seem that payments to such masters or members of crews cannot be made from the unemployment fund of the state lodged with the Secretary of the

Treasury under Section 1603 (a) (3). And it woul seem that a state law requiring, or, as here, construe to require, such payments cannot properly be ap proved by the Board under the above provisions. result of such disapproval would be that credit shoul be denied to all New York employers under Sectio 1601. To avoid such incongruous result and confor to the principle of the cases cited above, the origina construction by the Attorney General should b adhered to by this court for the reasons stated in thi and in appellant's brief.

CONCLUSION.

The decision and order of the Court of Appea should be reversed.

Respectfully submitted,

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Dated May 12, 1943.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 722

STANDARD DREDGING CORPORATION, APPELLANT

v.

FRIEDA S. MILLER, INDUSTRIAL COMMISSIONER, ET A

No. 723

INTERNATIONAL ELEVATING COMPANY, APPELLANT

v.

FRIEDA S. MILLER, INDUSTRIAL COMMISSIONER, ET AL.

ON APPEALS FROM THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

In No. 722 the findings of fact and decision of the Referee of the Department of Labor of the State of New York (R. 5–9), and of the Unemployment Insurance Appeal Board of the Depart-

ment of Labor of the State of New York (R. 2–3), are unreported. The opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, is reported at 263 App. Div. 773. (R. 104-105.) The opinion of the Court of Appeals of the State of New York is reported *sub nom. Claim of Cassaretakis,* 289 N. Y. 119. (R. 107–115.)

In No. 723, findings of fact and decision of the the Referee of the Department of Labor of the State of New York (R. 10–13) and of the Unemployment Insurance Appeal Board of the Department of Labor of the State of New York (R. 3–8) are unreported. The opinion of the New York Supreme Court, Appellate Division, Third Judicial Department, is reported at 262 App. Div. 654. (R. 55–57.) The opinion of the Court of Appeals (R. 60–69) is reported *sub nom. Claim of Cassaretakis,* 289 N. Y. 119.

JURISDICTION

The Court of Appeals rendered its decisions in both cases on October 15, 1942, reversing the orders of the Appellate Division. On October 22, 1942, on remittitur from the Court of Appeals, the order of reversal of that court was made the order of the Appellate Division, Third Department. (No. 722, R. 117–118; No. 723, R. 69–70.) The applications for appeal were filed December 30, 1942. On March 8, 1943, this Court

noted probable jurisdiction. The jurisdiction of this Court rests on Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the New York State Unemployment Insurance Law, as applied to maritime employment within the geographical boundaries of the State, contravenes Article III, Section 2 of the Constitution of the United States or Section 1607 (c) (4) of the Internal Revenue Code.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitution of the United States of America:

> ARTICLE III.
>
> Section 2. The Judicial Power shall extend * * * to all Cases of admiralty and maritime Jurisdiction; * * *

Internal Revenue Code:

> SEC. 1600. RATE OF TAX [As amended by § 608, Social Security Act Amendments, 1939, c. 666, 53 Stat. 1360].
>
> Every employer (as defined in section 1607 (a)) shall pay for the calendar year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in section 1607 (b)) paid by him during the calendar year with respect to employment

(as defined in section 1607 (c)) after December 31, 1938. (U. S. C., Title 26, Sec. 1600.)

* * * * *

SEC. 1607. DEFINITIONS [As amended by § 614, Social Security Act Amendments, 1939].

When used in this subchapter—

* * * * *

(c) *Employment.*—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—

* * * * *

(4) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

* * * * *

(U. S. C., Title 26, Sec. 1607.)

McKinney's Consolidated Laws of New York Annotated, Book 30, Labor Law: [Words in brackets were eliminated on March 27, 1941, N. Y. Laws, 1941, c. 169 and c. 669.]

ARTICLE 18.—UNEMPLOYMENT INSURANCE FUND

§ 502. *Definitions.*

As used in this article:

1. "Employment," except where the context shows otherwise, means any employ-

ment under any contract of hire, express or implied, written or oral, including all contracts entered into by helpers and assistants of employees, whether paid by employer or employee, if employed with the knowledge actual or constructive of the employer [in which all or the greater part of the work is to be performed within this state].

(1) The term "employment" shall include an individual's entire service, performed within or both within and without this state if: (a) the service is localized in this state; or (b) the service is not localized in any state but some of the service is performed in this state, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this state; or (ii) the base of operations or place from which such service is directed or controlled is not any state in which some part of the service is performed, but the individual's residence is in this state.

(2) Services performed within this state but not covered under paragraph (1) of this subdivision shall be deemed to be employment subject to this article if contributions are not required and paid with respect to such services under an unemployment compensation law of any other state or the federal government.

(3) Services not covered under paragraph (1) of this subdivision and performed entirely without the state, with re-

spect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the federal government, shall be deemed to be employment subject to this article if the individual performing such service is a resident of this state and the commissioner approves the election of the employer for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this article.

(4) Service shall be deemed to be localized within the state if

(a) the service is performed entirely within the state; or (b) the service performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state, for example, is temporary or transitory in nature or consists of isolated transactions.

But for the purposes of this article, "employment" shall not include: (1) [Employment as a farm laborer];

(2) Employment by an employer of his spouse or minor child;

(3) Employment as a golf caddy;

(4) Employment, after June thirtieth, nineteen hundred thirty-nine, with respect to which unemployment compensation is payable under the federal railroad unemployment insurance act (52 stat. 1094);

* * *

STATEMENT

In 1935 Congress enacted a program of social security legislation. Among the provisions of the Social Security Act is Title IX, imposing a federal unemployment tax upon employers, with certain exceptions, measured by the total wages paid by such employers. Title IX, now Sections 1600–1611 of the Internal Revenue Code, was enacted for the purpose of inducing the various states to enact unemployment compensation insurance laws for the benefit of employees. To accomplish this purpose, Title IX provides that employers subject to the federal tax shall be credited up to 90 percent of such tax for all amounts contributed by them to state unemployment insurance funds. (Sec. 1601.) The federal act sets up no unemployment insurance plan and, with the exception of a few general standards (Sec. 1602), leaves the states free to establish whatever plan they desire. Among exemptions from the federal tax is that of "Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States". (Sec. 1607 (c) (4).)

The State of New York enacted its unemployment insurance law to become effective on January 1, 1936. McKinney's Consolidated Laws of New York Annotated, Book 30, Labor Law, Article 18, Secs. 500–539. Under that law, an unemployment insurance fund (Sec. 514) is created, to be administered as a trust fund and to be used solely

to pay benefits to employees temporarily unemployed under certain prescribed conditions. See Sections 504, 505, 506, 507. The state is liable to the employees for the payment of the benefits provided (Sec. 503) and an administrative procedure is established for adjudication and payment of claims by the state (Sec. 510, 518, 530–537). An excise tax is imposed by the state upon all employers subject to the Act. (Sec. 515.) The amount of the tax is measured by the amount of wages paid for the services covered by the Act. (Sec. 516.) Section 502 defines the employment or services covered by the Act. That section provides that the protected employment shall include an individual's entire services performed within and without the state if (a) the service is localized in the state, or (b) if the service is not localized in any state but some service is performed in the State of New York and the base of operations is in the state.[1] Exemptions from the excise tax are provided for farm labor, golf caddies, and employment by an employer of his spouse or minor child. No exemption relating to maritime employment is provided.

The present appeals involve two claims filed by employees pursuant to the New York State Unemployment Insurance Law.

[1] The New York Act also provides that employment shall include work not localized in any state but some of which is performed in New York, if the work is not based or controlled within any state in which some part of it is performed, where the individual's residence is in New York.

In case No. 722, the undisputed facts disclose that Mike Cassaretakis, the claimant, was employed by the Standard Dredging Corporation, a New York corporation, from March 15 to August 15, 1939. During that period the company operated the dredge "Miami" at Gravesend Bay, wholly within the territorial borders of the State of New York. The dredge, leased or chartered from a New Jersey corporation, was employed in the execution of a contract with the City of New York Park Department which required that material be pumped from beneath the surface of the Bay to fill the shoreline and thereby make possible the extension of a public highway. The "Miami" is not a self-propelled dredge and in the course of the highway project was moved from time to time by means of cables and spuds. Cassaretakis was assistant cook, dishwasher, and waiter taking care of the needs of the dredge personnel, and during the last few weeks of his employment also served as a watchman. (R. 5–6.)

The Referee who heard the case in the first instance found that the "Miami" was engaged in construction work intimately connected with land operations rather than navigation and that Cassaretakis and all other employees on the "Miami" were not "members of a crew" of a vessel. He, therefore, ruled that their employment was covered by the state unemployment insurance law and that the employer was liable for

contributions to the state fund. (R. 7–8.) The State Unemployment Insurance Appeal Board affirmed the Referee (R. 2–3). The Appellate Division of the New York Supreme Court reversed the Appeal Board. That court ruled that Cassaretakis was a member of a crew of a documented vessel operating on navigable waters and that his employment was subject exclusively to the jurisdiction of the Federal Government, under Article III, Section 2 of the Constitution of the United States, and Section 1607 (c) (4) of the Internal Revenue Code. (R. 104–105.)

In case No. 723, the claimant, Joseph Bergen, was in the employ of the International Elevating Company during 1938 and 1939. That company operates floating elevators on the navigable waters of New York harbor and tributary streams. It is conceded that a greater portion of these operations is within waters adjacent to the State of New York. The function of the elevators is to transfer bulk grain to oceangoing vessels. The grain is brought to New York harbor from other ports and it is ultimately destined for delivery in foreign ports. The elevators are self-propelled vessels documented under the laws of the United States and registered at their home port of New York City. The elevators have two general classes of employees: (1) a full crew for navigation of the vessel; (2) grain workers who operate the elevator machinery for the transfer of grain

from one vessel to another. The claimant, Bergen, was a grain worker performing the duties of a "header" or "trimmer". (R. 3–4, 10–12.)

The Referee found that Bergen was not a member of the crew of a vessel and held that application of the state unemployment insurance law to him would not contravene the Federal Constitution requiring uniformity of admiralty laws. He, therefore, ruled that Bergen's employment was covered by the state law and that his employer was liable for contributions to the state fund. (R. 13.) The Appeal Board affirmed the Referee, expressly finding that Bergen was not a member of the crew of the vessel (R. 8). The Appellate Division of the New York Supreme Court reversed on the ground that claimant's employment was maritime and that the state law could not be construed to interfere with the exclusive maritime jurisdiction vested in the Federal Government by Article III, Section 2 of the Constitution (R. 55–57).

These two cases with four others were appealed to the Court of Appeals of the State of New York and decided by that court in a single opinion. The Court of Appeals held that Article III, Section 2, did not prohibit application of the New York statute to maritime employment generally, and that Congress had not preempted the field by enactment of Section 1607 (c) (4), exempting from the federal excise tax the employment of indi-

viduals as officers or members of crews of vessels on the navigable waters of the United States.

In addition to the two cases here involved, the Court has taken jurisdiction of two other cases covered by the same decision of the New York Court of Appeals. *Matton S. S. Co.* v. *Miller,* No. 783; *Lake Tankers Corp.* v. *Miller,* No. 813. The latter two cases, and also *Great Lakes Dredge & Dock Company* v. *Charlet,* No. 849 (which arises under the Louisiana unemployment compensation statute), involve employees who were unquestionably members of crews. Although it is arguable, in view of the exemption in Section 1607 (c) (4) for crew members, that they occupy a different status from maritime workers not so engaged, we do not think there is any sound differentiation between them. Accordingly, except as otherwise indicated, this brief may also be treated as applicable to the issues presented in Nos. 783, 813, and 849.

SUMMARY OF ARGUMENT

I

The New York Unemployment Insurance Law, as applied to maritime employment within the state, does not contravene Article III, Section 2, of the Constitution of the United States, which provides that the federal judicial power shall extend "to all Cases of admiralty and maritime Jurisdiction."

Under the decisions of this Court the states are free to extend their legislative authority to maritime operations within their borders so long as the legislation does not work material prejudice to the characteristic features of maritime law, nor interfere with its uniformity in international and interstate relations, and provided it does not contravene any act of Congress. The rule is that the state legislation is valid unless it modifies the substantive maritime law or displaces or substantially alters the remedies peculiar to admiralty jurisdiction.

The New York Unemployment Insurance Law does not affect the substantive features of admiralty law, for it in no way alters the relationship between maritime employer and employee. The rights, obligations, and liabilities of each party to the maritime employment contract remain unchanged. Neither has any new or substituted rights against, or obligations to, the other. The statute merely places an excise tax on the employer for which he is liable to the state, and gives the employee, under specified conditions, a right to receive benefits from a state fund. Moreover, there is no interference with the uniformity of maritime law in its international or interstate relations, since the substantive features of admiralty are in no way affected and the State of New York seeks in these cases only to apply its law to maritime employment substantially within its own borders.

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The decisions of this Court invalidating state workmen's compensation acts, as applied to maritime employment upon navigable waters within the states, are not controlling. In those cases, the Court concluded that, because the common law rights and liabilities of maritime employer and employee with respect to injuries received in the course of employment were abolished and statutory remedies based on liability without fault were substituted, workmen's compensation statutes modified the substantive law of admiralty and interfered with its uniform operation. Those features are not present in the New York unemployment insurance act.

If the Court deems that the two types of statutes are not distinguishable, we believe that it should reexamine, and overrule or narrow the effect of, the decisions respecting state workmen's compensation statutes. Although such cases may still be legitimately considered as guides to the interpretation of the Longshoremen's and Harbor Workers' Compensation Act, their implications need no longer be followed as constitutional doctrine. At the very least, their authority should not be extended into a new field.

II

By enactment of Section 1607 (c) (4) of the Internal Revenue Code, Congress has not preempted the field. Section 1607 (c) (4) was origin-

ally a part of Title IX of the Federal Social Security Act of 1935. Title IX is merely a taxing statute, designed to encourage the states to establish their own systems of unemployment insurance. Title IX sets up no rival federal system. The legislative history discloses that Congress intended to leave the states free to enact systems of their own design. There are no federal requirements as to what employment the state laws shall cover, and most of the states have departed in numerous respects from the tax coverage of the federal statute. Although Section 1607 (c) (4) exempts from the federal unemployment insurance excise tax "Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States," the states are not expressly or by implication precluded from insuring such employment if they elect to do so. Since there is no conflict between the state and federal legislation, the state law is valid.

ARGUMENT

I

The New York State Unemployment Insurance Law, as Applied to Maritime Employment Within the State, Does Not Contravene Article III, Section 2, of the Constitution of the United States

Article III, Section 2, of the Constitution provides that the federal judicial power shall extend

to all cases, in law and equity, arising under the Constitution and laws of the United States and "to all Cases of admiralty and maritime Jurisdiction".

From this grant of judicial power it has been implied that the Constitution grants to Congress the legislative power to make substantive modifications of the admiralty and maritime law as it existed at the time the Constitution was adopted. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375; *Lindgren* v. *United States,* 281 U. S. 38; *Detroit Trust Co.* v. *The Barlum,* 293 U. S. 21; *Butler* v. *Boston Steamship Co.,* 130 U. S. 527; *In re Garnett,* 141 U. S. 1. See also *The Western Maid,* 257 U. S. 419, 432.

Although Congress is held to have paramount power, it has been uniformily recognized that general maritime law may, within limits, be changed, modified or affected by state legislation. The rule was clearly stated by this Court in *Just* v. *Chambers,* 312 U. S. 383, where the Court said (p. 389):

> * * * a State, in the exercise of its police power, may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action "does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony

> and uniformity in its international and interstate relations."

And again (p. 391):

> This criterion * * * is a broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders, when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction. See *Minnesota Rate Cases*, 230 U. S. 352, 402–410. * * *

These principles have been frequently applied so as to uphold state regulation of many matters subject to the federal maritime jurisdiction. The cases are summarized *infra*, pages 19–23. Under the test enunciated in *Just* v. *Chambers, supra*, there can be little question but that state unemployment compensation laws may be applied to maritime employees. Doubt exists, we believe, only because of the decision of this Court in *Southern Pacific Company* v. *Jensen*, 244 U. S. 205, and the cases following it, which held that the states had no constitutional power to apply their workmen's compensation laws to maritime employees.

The appellants in the present cases have maintained the position that the rule applied in the *Jensen* line of decisions to invalidate state workmen's compensation laws also invalidates state unemployment insurance laws. It is the view of the Government (a) that the New York unemployment insurance law does not interfere with

the characteristic features and uniformity of admiralty law which Article III, Section 2, has been held to require, regardless of the validity of the application of that rule to state workmen's compensation cases, and (b) that if this Court deems that state unemployment insurance laws and workmen's compensation laws cannot be differentiated, the *Jensen* line of decisions should be reexamined. We proceed to elaboration of those contentions.

A. THE NEW YORK UNEMPLOYMENT INSURANCE LAW NEITHER AFFECTS ANY CHARACTERISTIC FEATURES NOR INTERFERES WITH THE UNIFORMITY OF ADMIRALTY AND MARITIME LAW

At the outset, it should be pointed out that the New York unemployment insurance law does not in any way disturb the substantive features of maritime or admiralty law. It has no effect upon maritime contracts. It does not alter or affect any rights or liabilities imposed by admiralty law upon either the employer or the employee.

The statute imposes an excise tax payable by employers upon the right or privilege of entering into the employment relationship. See *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495; *Steward Machine Co.* v. *Davis*, 301 U. S. 548. This Court has affirmed the constitutionality of the excise tax imposed by this very statute (*Chamberlin* v. *Andrews*, 299 U. S. 515, affirming 271 N. Y. 1), as well as similar excise taxes imposed by other states for the support of their unemployment insurance funds. *Carmichael* v.

Southern Coal & Coke Co., supra. The employer is made liable to the state, just as he is liable for any other validly imposed tax. The statute takes away from a maritime employer no right conferred upon him by admiralty law. In fact, it deprives him of no right whatever. See *Beeland Wholesale Co.* v. *Kaufman,* 234 Ala. 249. Moreover, it gives the employee no right of action against the employer, and thus imposes no new liability in contract upon the latter. The employee's only right in the event he becomes unemployed is to assert his claim against the State of New York for the benefits provided by law. In short, the statute does not in any manner affect the rights and obligations fixed by the maritime contract itself. *Beeland Wholesale Co.* v. *Kaufman, supra.*

It has repeatedly been recognized that state taxing statutes, otherwise valid, are not rendered invalid because they have an incidental or indirect effect upon matters over which the Federal Government has been granted legislative power. Past decisions of this Court have sustained the application of numerous state tax statutes to maritime operations within the states. One engaged in maritime commerce may be lawfully subjected to a state tax upon the property employed in that business. *Old Dominion S. S. Co.* v. *Virginia,* 198 U. S. 299, 305; *Ayer & Lord Co.* v. *Kentucky,* 202 U. S. 409, 421. State franchise

taxes upon towing companies have uniformly been upheld. *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549. Taxes upon shipping may be laid by the state without affecting the characteristic features of admiralty law or its required uniformity.[2] *Transportation Co.* v. *Wheeling*, 99 U. S. 273. This Court has likewise approved tolls levied upon ships using state-improved waterways, without regard to the fact that the vessels were engaged in interstate and foreign trade. *Sands* v. *Manistee River Imp. Co.*, 123 U. S. 288; *Huse* v. *Glover*, 119 U. S. 543; *Escanaba Co.* v. *Chicago*, 107 U. S. 678. Perhaps even more significantly, in *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, this Court sustained a municipal license fee imposed upon ferry operators, even though the amount of the fee was measured by the number of vessels maintained in operation on navigable waters. See also *Packet Co.* v. *Keokuk*, 95 U. S. 80, permitting municipal wharfage charges based on ship tonnage. The levy of an excise tax on the privilege of employing the services of individuals in maritime operations no more alters the substantive law of admiralty or interferes with the uniformity of its operation in international or inter-

[2] It may also be noted that the validity of state taxation of marine insurance corporations, whose contracts are maritime in nature (*Insurance Company* v. *Dunham*, 11 Wall. 1; *Aetna Ins. Co.* v. *Houston Oil & Transport Co.*, 49 F. 2d 121 (C. C. A. 5th)) appears never to have been challenged in this Court.

state aspects than do the taxes whose validity has been upheld.

This Court has already held that excise taxes levied upon employers engaged in interstate commerce by states for the support of their unemployment insurance funds are not violative of the commerce clause. *Perkins* v. *Pennsylvania,* 314 U. S. 586, affirming 342 Pa. 529. This decision rested on Section 1606 (a) of the Internal Revenue Code, which provides that persons shall not be relieved from compliance with state unemployment insurance laws on the ground that they are engaged in interstate or foreign commerce. Many maritime workers are, of course, so engaged, and it is unlikely that Congress would have differentiated in its intention as to the taxing power of the states between employees engaged in interstate or foreign commerce generally and those engaged in maritime activities.

In fields other than taxation, state legislation affecting maritime operations and even supplementing the rights and remedies available under the traditional admiralty law has been upheld. For example, state laws concerning pilotage, although constituting regulations of interstate and foreign commerce as well as of maritime matters, are valid until Congress legislates. *Cooley* v. *Board of Wardens,* 12 How. 299; *Steamship Co.* v. *Joliffe,* 2 Wall. 450, 459; *Ex parte McNiel,* 13 Wall. 236, 240; *Wilson* v. *McNamee,* 102 U. S. 572;

Olsen v. *Smith,* 195 U. S. 332, 341; *Anderson* v. *Pacific Coast S. S. Co.,* 225 U. S. 187. Especially significant, because one of the instant cases (No. 723, *International Elevating Company* v. *Miller*) involves the same kind of business enterprise, is the case of *Budd* v. *New York,* 143 U. S. 517, which sustains the validity of state regulation of rates charged by floating elevators in territorial and harbor waters.

This Court has also consistently upheld the application of additional and supplemental state remedies to admiralty jurisdiction. In *The Loitawanna,* 21 Wall. 558, liens granted by state law to material men for supplies furnished to vessels in their home ports were upheld. Similarly, the contention that Article III, Section 2, prohibits state legislation providing liens against vessels both for the cost of repairs and for wages of masters has been rejected. *The J. E. Rumbell,* 148 U. S. 1. Numerous state "death statutes," granting a cause of action to the estate of a person dying from tort injuries received on navigable waters, have been held not to alter the substantive features of admiralty or interfere with its uniformity of operation. *The Hamilton,* 207 U. S. 398; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233; *Gt. Lakes Co.* v. *Kierejewski,* 261 U. S. 479. See also *Vancouver S. S. Co.* v. *Rice,* 288 U. S. 445; *The Harrisburg,* 119 U. S. 199, 213. The same conclusion has been reached with respect to similar

state statutes providing for the survival of a cause of action after death of a person who suffered a tortious injury on navigable waters. *Steamboat Co.* v. *Chase,* 16 Wall. 522; *Sherlock* v. *Alling,* 93 U. S. 99. Only recently in *Just* v. *Chambers,* 312 U. S. 383, this Court held that a Florida statute providing that an action for personal injuries shall survive the death of a tort feasor is enforceable in a court of admiralty where the accident had occurred on navigable waters within the territorial boundaries of the state. Contentions that the statute violated Article III, Section 2, by creating a liability unknown to admiralty and by interfering with the uniform operation of maritime law were rejected. Other instances in which the validity of state-created rights and local regulations have been upheld as to maritime relations are cited in *The City of Norwalk,* 55 Fed. 98, 106–107 (S. D. N. Y.). See also *Grant Smith-Porter Co.* v. *Rohde,* 257 U. S. 469, 477–478; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 204, 214–217; *United States* v. *Bevans,* 3 Wheat. 336.

The statutes involved in all the above-cited cases affected the conduct of business operations on navigable waters or supplemented or even created new *in personam* rights and liabilities relating to maritime operations. Yet all were held not to affect the characteristic features of admiralty jurisdiction or interfere with the uniformity of its operation within the meaning of those terms as read into Article III, Section 2.

Until the decision of this Court in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, few state statutes relating to maritime operations had been invalidated. Apart from decisions holding state legislation invalid because it conflicted with existing federal legislation,[1] earlier decisions invalidating state legislation under Article III, Section 2, were almost wholly limited to statutes seeking to confer upon state courts the exclusive remedies peculiar to admiralty jurisdiction. *The Moses Taylor*, 4 Wall. 411; *The Hine* v. *Trevor*, 4 Wall. 555; *The Belfast*, 7 Wall. 624; *The Glide*, 167 U. S. 606, 616 *et seq.*; *The Roanoke*, 189 U. S. 185; see also *Workman* v. *New York City, Mayor &c.*, 179 U. S. 552; *Hendry Co.* v. *Moore*, No. 60, decided February 8, 1943.

State workmen's compensation laws, as applied to maritime employment, were invalidated in the *Jensen* case and those following it because this Court was of the view that they were inconsistent with the characteristic substantive features of admiralty law. Regardless of the correctness of that conclusion, we believe those decisions to be wholly inapplicable in determining the validity of state

[1] The few cases holding state legislation with respect to maritime matters invalid because of conflict with federal laws seem to have been concerned almost exclusively with the commerce clause rather than with Article III, Section 2, although the latter might perhaps also have been invoked. *Gibbons* v. *Ogden*, 9 Wheat. 1; *Sinnot* v. *Davenport*, 22 How. 227; *Moran* v. *New Orleans*, 112 U. S. 69; see also *Harman* v. *Chicago*, 147 U. S. 396.

unemployment insurance laws. State workmen's compensation statutes create rights and liabilities *between the parties* to a maritime contract which this Court held in the *Jensen* case not to be a part of the general admiralty law of the United States. (But see the dissent of Mr. Justice Brandeis in *Washington* v. *Dawson & Co.*, 264 U. S. 219, 232.) More significantly, those laws substituted new rights and liabilities for the traditional rights and liabilities in tort which had long been recognized in admiralty. They modified or set aside the traditional maritime rights and obligations and replaced them with the rule of employer liability regardless of fault. See, for example, Sections 7673 and 7679 of the Washington Workmen's Compensation Act, involved in *Washington* v. *Dawson & Co., supra,* which expressly withdraw from private controversy the "common law system governing the remedy of workmen against employers" and "in lieu of any and all rights of action", substitute scheduled compensation awards. Such statutes, the court held, were invalid as applied to maritime employment within the various states "because their provisions were held to modify or displace essential features of the substantive maritime law." *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 124.

Unemployment insurance laws, such as the New York statute, do not in any way affect the relationship between employer and employee under a maritime contract. The rights, obligations, and liabili-

ties of each party with respect to the other "remain untouched and unchanged and still wholly under the aegis of admiralty law; no subtraction, addition or substitution takes place." *Great Lakes Dredge & Dock Co.* v. *Charlet,* 43 F. Supp. 981, 987 (E. D. La.), affirmed by the Fifth Circuit, February 11, 1943, certiorari granted April 5, No. 849. The employer pays taxes to the state, regardless of whether his employees draw any compensation. The state pays benefits to the employees, irrespective of whether the employer pays his taxes. Furthermore, even if the unemployment compensation plan be treated as a unit, the fundamental test devised by this Court for determining the validity of state legislation under Article III, Section 2, is whether the legislation modifies the substantive maritime law or displaces or substantially alters existing remedies enforceable in admiralty. *Red Cross Line* v. *Atlantic Fruit Co., supra,* p. 125. If the state legislation accomplishes none of these results, its application to matters within admiralty jurisdiction is valid. The maritime law never has been concerned one way or the other with unemployment compensation. It had no rule or provision on the subject, prohibitory or otherwise. Nor do we think that the silence of the maritime law can be said to constitute an implied prohibition. Thus, as previously indicated, where admiralty jurisdiction offers no substantive right or procedural remedy whatever, the application of

state legislation to maritime matters within the State is permissible. See, e. g., *The Hamilton, supra; Just* v. *Chambers, supra.*

The appellant in No. 723 contends in its brief (pp. 11–13, 17–18) that, if the states are permitted to apply their unemployment insurance laws to maritime employment, the uniformity and harmony claimed to be essential to maritime matters will be disrupted and maritime commerce will be burdened by discordant and conflicting legislation. Specifically, it is urged that appellant may be liable for excise taxes levied by both the State of New York and the State of New Jersey on account of the same employment. We believe that this threat is more theoretical than real. In determining whether such double taxation is likely to occur it is significant that of 51 state and territorial jurisdictions which have unemployment insurance laws, 48 have adopted substantially the same definition of employment for jurisdictional purposes.[4] See 1 C. C. H., Unemployment Ins. Serv., paragraph 993, pp. 191–192. Thus, it may

[4] Only the States of New Hampshire and Vermont and the District of Columbia have jurisdictional provisions which may be considered substantially different from those of the majority of the States and territories. Even the provisions of these three jurisdictions do not extend their statutes to employment outside their geographical boundaries unless a greater part of the work is performed within their boundaries or unless the base of operations or control is located therein. 1 C. C. H., Unemployment Ins. Serv., paragraph 993, pp. 191–192.

be said that the states themselves have established an essentially uniform standard for determining the scope of their unemployment insurance laws, thereby effectively minimizing the possibility of conflict or duplication.

The claims involved in the cases here on appeal embrace the years 1938 and 1939. At that time, the New York statute extended its coverage to employment "in which all or the greater part of the work is to be performed within this state." (Section 502, pp. 4–5, *supra.*) Theoretically, such a provision might have led to some overlapping of jurisdiction since the New Jersey law (which contained the standard definition) covers employment when some of the service is performed within that state and when that state is also the base of operations. (New Jersey Unemployment Compensation Law, Section 43:21–19.) But there is no claim that New Jersey ever asserted jurisdiction over any part of the employment here involved, or that there has in fact been any conflict or discord. Indeed, the New Jersey law (Section 43:21–19) exempts from unemployment insurance coverage members of crews of vessels on navigable waters of the United States, and state administrators may have construed that exemption to include all employees of the floating elevators of appellant, especially since the Treasury Department in 1937 construed the identically phrased exemption in Title IX of the Federal statute to exempt floating elevator employees. (No. 723, R. 40, 41, 50–52.)

In any event, the New York law was amended in 1941 by striking from the definition of employment the phrase "in which all or the greater part of the work is to be performed within this state." (Laws of New York, 1941, c. 169, effective March 27, 1941.) Since that amendment, the jurisdictional tests of the New York and New Jersey laws have been substantially identical, thereby eliminating any possible *statutory* conflict. Under the present statutes each state law applies primarily to its own localized employment and to employment based or controlled within the state. Both the New York and the New Jersey statutes[5] further assure that their coverage of any other services performed within the state will not also be covered under the laws of another state by expressly providing for coverage *only* "if contributions are not required and paid with respect to such services under an unemployment compensation law of any other state or the federal government." These provisions demonstrate that the respective state laws have been very carefully drafted so as to avoid any possibility of overlapping.

Appellant, however, insists that interpretations of the same statutory provisions by various state

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[5] New Jersey Laws, 1936, c. 270, sec. 19, New Jersey Stats. Anno., Title 43, c. 21, sec. 19. Twelve of the state laws have this provision. See 1 Prentice-Hall, Unemployment Ins. Serv., paragraph 27,126.1. A number of other state statutes provide for reciprocal arrangements so as to avoid overlapping. *Ibid.*

administrative bodies may be in conflict, and thereby bring about an overlapping of coverage. This, of course, could occur, although the conflicting interpretations could not be deemed final until and unless approved by the highest court of each state, and by this Court if any federal question were thought to be presented. But appellant has been unable to point to any examples of double liability either in the maritime field or in the broader field of interstate commerce in which Congress specifically authorized the states to act. Internal Revenue Code, Section 1606 (a). Most of the State unemployment insurance laws have been in effect since 1936. So far as we have been able to ascertain no litigation has arisen which involves the levy of assessments upon the same employment by more than one state. Nor have we found any administrative rulings imposing double liability upon employers by reason of the same services. This is true of non-maritime services performed in more than one state, as well as of maritime employment. Indeed, since all but four of the states exempt some types of maritime employment (e. g., service as an officer or member of a crew of a vessel on the navigable waters of the United States, see 1 C. C. H., Unemployment Ins. Serv., paragraph 993A, p. 195–2), conflicts and overlapping are much less likely to arise with respect to maritime employment than with respect to non-maritime interstate employment.

We may assume that the application of two state unemployment compensation laws to the same employment would so burden the uniformity and harmony of maritime law as to be invalid—although this is not at all clear (cf. *Curry* v. *McCanless*, 307 U. S. 357; *Texas* v. *Florida*, 306 U. S. 398, and the cases in the Dorrance Estate Tax litigation, cited at 306 U. S. 411). But when the state statutes have obviously been prepared so as to avoid such overlapping, and when double coverage has not been shown to exist in any specific cases, the possibility that it might conceivably occur is far too speculative and weak a factual foundation upon which to support a holding that the application of state unemployment compensation laws to maritime matters is always so burdensome as to be invalid. The overlapping would occur, at most, only in rare cases, and the general validity of the law should be determined by the rule and not by the exception. Possibly when two states actually do seek to impose two unemployment taxes on the same maritime employment, the taxpayer should be able to obtain protection against one of the exactions. But no such claim is made here, and the Court may deal with that situation when—and if—it arises.

B. THE *JENSEN* CASE SHOULD NOT BE REGARDED AS AUTHORITATIVE IN THE UNEMPLOYMENT COMPENSATION FIELD

For the reasons indicated above, (pp. 24–31), we think that the status of workmen's compen-

sation laws as applied to maritime workers may be differentiated from that of unemployment compensation statutes. If the Court is not satisfied with the distinctions suggested, we believe that the *Jensen* case should be limited as an authority to the precise question there before the Court, or overruled insofar as it stands for constitutional doctrine.

We recognize that in *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244 and *Davis* v. *Department of Labor and Industries*, 317 U. S. 249, this Court refused to overrule the *Jensen* case because of the confusion which such a decision would entail in the field of workmen's compensation for maritime workers. The Longshoremen's and Harbor Workers' Compensation Act was enacted on the basis of this Court's holding in the *Jensen* case, and that statute would be nullified if the effect of the *Jensen* decision as applied to workmen's compensation were eliminated. We do not think, however, that the Court is precluded from disregarding the *Jensen* case as a *constitutional* authority by the need for preserving its efficacy in the workmen's compensation field. Since the Longshoremen's and Harbor Workers' Act was predicated on the *Jensen* decision, the principles of that case may be accepted "as the measure by which Congress intended to mark the scope of the Act they brought into existence." *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S., at 250. The de-

cision may thus be said in substance to have been incorporated by reference (see *Davis* v. *Department of Labor and Industries,* 317 U. S., at 256) into the Longshoremen's Act. It can remain as a guide to the interpretation of that statute, even though its constitutional implications are rejected.

In view of the absence of any expression of approval of the *Jensen* case in the *Parker* and *Davis* opinions,* we read those decisions as manifesting an unwillingness to let the *Jensen* decision have any greater force than is necessary to maintain the effectiveness of the Longshoremen's and Harbor Workers' Act. The question here is whether the *Jensen* case should be given an expanded application to unemployment compensation laws. Even if the case should not be overruled, we think that its effect as an authority may well be limited to the type of statute there before the Court.

We believe the unsoundness of the *Jensen* decision is demonstrated by the dissenting opinions in that case and in *Knickerbocker Ice Company* v. *Stewart,* 253 U. S. 149, 167, and *Washington* v. *Dawson & Co.,* 264 U. S. 219, 228. Furthermore, we think the case inconsistent in reasoning with this Court's subsequent decision in *Just* v. *Chambers,* 312 U. S. 383, since we find no satis-

* In the *Davis* case Mr. Justice Frankfurter, concurring, referred to the *Jensen* case as "that ill-starred decision" (317 U. S., at 259), and the Chief Justice indicated his willingness to overrule the *Jensen* decision (*id.*, at 263).

factory basis for concluding that a state workmen's compensation law is more "hostile to the characteristic features of the maritime law" (312 U. S., at 388) than the state survival statute upheld in the *Just* case. The error in the *Jensen* case, we believe, lies primarily in its application of the formula laid down. Although state laws which "work[s] material prejudice to the characteristic features of the general maritime law or interfere[s] with the proper harmony and uniformity of that law in its international and interstate relations" (244 U. S., at 216) may reasonably be deemed invalid, it is difficult to see why a workmen's compensation act should be held to fall within that class.

II

Title IX of the Federal Social Security Act Does Not Deprive the States of Power To Apply Their Unemployment Compensation Laws to Maritime Employment Within Their Boundaries

We are satisfied for the reasons stated that the states are free to apply unemployment insurance laws to maritime employment within their boundaries unless Congress has already occupied the field by the enactment of conflicting legislation.

We now turn to consider whether Congress has enacted legislation depriving the states of their power to legislate with respect to unemployment insurance for maritime employees. It has been

urged that Title IX of the Federal Social Security Act, now Sections 1600–1611 of the Internal Revenue Code, has occupied the field and has the effect of prohibiting state unemployment insurance legislation in the maritime domain. We believe that Title IX was not intended to have, and in fact does not have, either of these effects.

In the first place, Title IX, which provides for a federal excise tax on employers (with certain exceptions), was enacted by Congress for the purpose of encouraging all the states to enact their own unemployment insurance laws, adapted to the diverse conditions of their industries. S. Rep. No. 628, 74th Cong., 1st Sess., pp. 12, 13. In fact, Congress expressly recognized the need for state legislation to protect all employees, whether engaged in purely local enterprises or commercial enterprises transcending state lines.[7] Title III of the Social Security Act, c. 531, 49 Stat. 620, providing federal funds to assist the states with the cost of administering their insurance acts, is further evidence of the same Congressional purpose. Both Title IX and Title III are expressions on the part of Congress that unemployment insurance legislation is a mat-

[7] Section 1606 (a) of the Internal Revenue Code provides:
"No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce."

ter of local concern which must be dealt with by state legislation.

Moreover, Congress has enacted no statute providing a federal unemployment insurance system for maritime employment. No question of rival federal and state systems is presented. In that sense there is, then, no occupation of the field by Congress. In the present cases, the State of New York has extended its system to cover maritime employment within the State. The Federal Government has established no insurance system for such employees. Title IX is no more than a federal tax upon employment which encourages the states to enact unemployment insurance laws by removing their fear of the competitive disadvantage which would accrue to the industries of a state imposing such laws while other states refrained from doing so. *Carmichael* v. *Southern Coal & Coke Co., supra; Steward Machine Co.* v. *Davis, supra;* Report to the President of the Committee on Economic Security (1935), p. 16. The fact that Congress, in selecting means to achieve this purpose, has imposed a tax on employers is in no way an occupation of the unemployment insurance field. The *sine qua non* of unemployment insurance is, of course, benefit payments to employees, for which the federal statute makes no provision. For these reasons, the provisions of the federal tax imposed by Title IX and the terms of the New York statute are in

no way inconsistent; each can stand without interfering with the other.

The only specific section of the federal law suggested as conflicting with the New York law is Section 1607 (c) (4), which exempts from the *federal* excise tax "Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States." This exemption could not possibly create any conflict with federal policy as to those maritime workers who are not members of crews. Thus it does not affect these two cases—Nos. 722 and 723—in which the employees were reasonably found not to be crew members (*supra,* pp. 9–11), although it might apply to the members of crews involved in Nos. 783, 813, and 849. But in any event, there is no incompatibility between a federal statute exempting the salaries of certain employees from a federal tax and a state law taxing such salaries and allowing such employees unemployment compensation.

The fact that maritime employers are exempt from a federal tax with respect to employment of officers and members of crews of vessels on navigable waters is by no means either a Congressional preemption of the field or a Congressional injunction prohibiting the states from extending the benefits of their own laws to the federally exempt class. The legislative history of the Social Security Act discloses that Congress

had no intention of requiring that the insurance benefit coverage of state laws conform to the tax coverage of the federal law. In both houses of Congress, the Committee reports on the legislation emphasize the fact the federal tax act was not designed to impose any pattern of unemployment insurance legislation upon the states. Thus, the Senate Committee on Finance states (S. Rep. No. 628, *supra*, at pp. 13–14):

> Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington. The States may or may not add employee contributions to those required from the employers. * * * Likewise, the States may determine their own compensation rates, waiting periods, and maximum duration of benefits. Such latitude is very essential because the rate of unemployment varies greatly in different States * * *.
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> Under the bill * * * the States will also have freedom of choice with regard to the type of unemployment compensation law they wish to enact. * * *
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> * * * * *
>
> * * * In accordance with the entire spirit of the Social Security Act, we believe that the Federal Government should not attempt to dictate to the States which

> type of unemployment compensation law they should adopt. The amendment * * * will eliminate all such dictation and leave the States free to decide for themselves which type best suits their peculiar conditions.

See also H. Rep. 615, Committee on Ways and Means, 74th Cong., 1st Sess., pp. 8 and 9.

In the Hearings before the Committee on Ways and Means, House of Representatives, on the Economic Security Act, 74th Cong., 1st Sess., the Executive Director of the President's Committee on Economic Security testified (p. 5):

> * * * it [the proposed plan] allows freedom for variations to meet the differing conditions in different States and will make it possible to get the practical experience needed to test the various theories which have been current as to the best type of an unemployment compensation act.

The scheme for federal legislation which would leave the states substantially unrestricted was first proposed by the President's Committee and was accepted by Congress in the legislation finally adopted. The Report to the President of the Committee on Economic Security states (p. 20):

> The plan for unemployment compensation that we suggest contemplates that the States shall have broad freedom to set up the type of unemployment compensation they wish. We believe that all matters

in which uniformity is not absolutely essential should be left to the States.

In accord with this policy, there are no provisions in Titles III and IX requiring that any specified type of employment be included in or excluded from the benefits of the state laws in order to obtain the advantages of federal aid. Had Congress intended to preclude the states from the field of maritime employment within their boundaries the obvious and elementary method of achieving that result would have been to make that exclusion one of the requirements for certification of the state laws.[8] See sec. 1603 of the Internal Revenue Code. That Congress

[8] Indeed, it was proposed by the President's Committee that a separate nationally administered system of unemployment insurance be set up for railroad employees and maritime workers and thereby preclude state coverage of such employment. See Report to the President of the Committee on Economic Security (1935), p. 18. But Congress did not immediately act on that recommendation. In 1938, a federal system of unemployment insurance was established for railroad employees (Railroad Unemployment Insurance Act, c. 680, 52 Stat. 1094; 45 U. S. C. secs. 351–367), but until that time railroad employees were covered by the state acts insofar as the states elected to include them. Various proposals have been made to create a federal plan for maritime employees, but Congress has not yet acted. (See H. R. 9798, 76th Cong., 3d Sess.; H. R. 560, 77th Cong., 1st Sess.; H. R. 5446, 77th Cong., 1st Sess.) Until Congress, by affirmatively establishing a federal system, preempts the maritime domain, the states are free to extend the benefits of their insurance laws to maritime employment within their territories. That no separate national systems were established in 1935 and that exclusion of railroad and maritime employment was not made a condition for approval or certification of state laws, are indications that Congress desired to leave the states free to work

did not do so is the strongest indication that it intended to leave the matter to state determination.

The legislative history suggests two possible reasons for the exclusion of the services of officers and crew members from the federal tax. The Committee Reports offer little explanation of this specific exclusion in Title IX. However, it is significant that Titles II and VIII of the Social Security Act, c. 531, 49 Stat. 620, which set up a *federal* system of old-age retirement pensions, originally excluded "Service performed as an officer or member of the crew of a vessel documented under the laws of the United States." (Sec. 210 (b) (4), 811 (b) (5).) The legislative history of this exclusion discloses that it was prompted by the prospect of administrative difficulties. The Report of the House of Representatives Ways and Means Committee, H. Rep. No. 615, 74th Cong., 1st Sess., states (p. 33):

> The administrative difficulty of following the wages of officers and seamen of crews was regarded as almost insurmountable.[9]
> * * *

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out their own coverage at the outset. With state experience as a basis, Congress could act at a later date to federalize portions of the system which could not be successfully operated by the various states.

[9] Cf. S. Rep. No. 628, 74th Cong., 1st Sess., p. 45.

In 1939, the Social Security Act was amended to include under the federal old-age benefit provisions officers and members of crews of vessels documented under the laws of the United States, 53 Stat. 1384. Sec. 1426 (b) (5) of the Internal Revenue Code now exempts only service on vessels not American if the employee is employed on such vessel when outside the United States.

See also the statement of Representative Vinson, of Kentucky, a member of the Ways and Means Committee. Cong. Record, Vol. 79, Part 6, p. 5903.

The administrative problems envisioned by Congress in applying a nation-wide pension system to members of crews were, if anything, less than those with which the states would be confronted in giving a similar application to unemployment insurance statutes. If Congress was unwilling to saddle a federal agency with such administrative difficulties, it was equally unwilling to do anything which might have the effect of imposing them on the states. For if the wages of members of crews had been subjected to the federal tax under Title IX, the result would have been that although the full tax would have been payable (without the 90% credit to the state), the employees would have received no compensation unless the coverage of the state statute was made equally broad. It was therefore entirely reasonable for Congress to exempt the services of officers and members of crews from the federal tax imposed by Title IX, as well as from the old-age pension system set up under Titles II and VIII. This did not mean, however, that Congress affirmatively desired that the states not grant unemployment compensation to such employees, but merely that it did not wish a state to be subjected to severe administrative burdens unless it was

voluntarily willing to assume them. The exemption thus left the states wholly free to include such employment if they wished; there was merely no federal stimulation to do so.

There was, perhaps, also a second motivating factor in the exemption from Title IX. State workmen's compensation laws had been held unconstitutional as applied to maritime employment. In view of these decisions there was, as the holding of the New York Appellate Division in these cases indicates, reason to doubt the validity of state unemployment insurance statutes similarly applied. We have been able to find only a single reference to this factor in the Congressional hearings, reports, and debates relating to Title IX.[10] During the House debate, Representative Vinson of Kentucky, after adverting to administrative difficulties, said (Cong. Record, Vol. 79, Part 6, p. 5903):

> They [seamen] were exempted in unemployment insurance because there is no power under State law to collect the tax from them. They come under maritime or admiralty jurisdiction, and the State sovereigns have not the power to collect the taxes.

[10] The report of the Social Security Board to Congress, referred to in the brief for appellant in No. 813, p. 20, was made in 1939, and therefore was not a part of the history of the exemption in the Federal Act of 1935. H. R. Doc. No. 110, 76th Cong., 1st sess., p. 16. The 1939 report shows that at that time the Board was of the view that the *Jensen* line of decisions deprived the states of power to apply their unemployment compensation laws to maritime employment.

The following exchange of remarks also occurred (*ibid.*):

> Mr. McCormack. Seamen are exempted under the unemployment-compensation title [Title IX] because of constitutional reasons that do not apply to the contributory annuities [Title VIII].
>
> Mr. Vinson of Kentucky. That is what I just said. They were exempted under Title VIII because of administrative difficulties.

Since Title IX was designed to induce the states to enact unemployment-insurance legislation and to permit employers assessed for contributions under state laws to use such assessments as credits against their federal tax, Congress had good reason for not imposing the federal tax upon employment which might conceivably be beyond the power of state legislation. But, again, it does not follow that Congress occupied or preempted the field by providing the exemption, or that it was affirmatively seeking to exclude the states from extending their laws into the field. Congressional hesitancy to invite the states to enact laws which might contravene decisions of this Court cannot be transmuted into a congressional command that they shall not do so.[11] It remained to the states to

[11] Application of the federal tax to a particular type of employment is, of course, an invitation to the states to extend their laws to the same employment; otherwise, the states would lose the 90% credit and the employees in the taxed employment would not receive unemployment com-

devise unemployment-insurance laws constitutionally applicable to maritime employment within their borders if they chose to insure such employment and, if necessary, carry to the courts the applicability of the workmen's compensation decisions.

We believe, then, that the legislative history of Title IX discloses that the services of officers and crew members were exempted from federal taxation not as a means of prohibiting the states from insuring such employment, but because Congress envisaged that the states might encounter legal and administrative difficulties if they included such employment in their laws pursuant to federal inducement. The reports and debates also reveal that Congress intended to leave the states entirely free to determine the types of employment to be covered and to establish no limitations whatever in that respect. The standards fixed for approval and certification of the state laws contain no requirements with respect to coverage, or any provision prohibiting the application of state laws to employment exempt from the federal tax. Nor would the application of state unemployment-compensation statutes to such employment give rise to

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pensation. This Court so held in *Buckstaff Bath House Co.* v. *McKinley*, 308 U. S. 358. But it does not follow that exemption from the federal tax manifests an intention that the states be prohibited from extending their laws to the exempted employment; the exemption shows only that Congress was not inviting them to reach the exempted occupation.

any practical difficulty in carrying out the scheme of the federal act or in harmonizing the operation of state and federal statutes in the cooperative manner contemplated by Congress.

The States and the Federal Social Security Board have so interpreted Title IX and have acted accordingly. The coverage of the State laws is often, and in many respects, broader than that of the Federal.[12] For example, numerous states have included employers of fewer than eight persons, the number fixed for application of the federal tax.[13] Likewise, many states have included employments expressly exempt from the federal tax of Title IX. In a few instances, there is no state equivalent for the federal exemption for certain types of domestic service.[14] Numerous states apply their laws to casual labor exempt from the federal act.[15] All these state laws have been approved by the Federal Social Security Board, pursuant to Section 1603 of the Internal Revenue Code, for the purpose of taking advantage of the 90 percent credit provided by Title IX of the federal statute. 5 Federal Reg. 69; 6 Fed. Reg. 59; 7 Fed. Reg. 189; 8 Fed. Reg. 191.

The conclusion is inescapable that the federal exemption of services of officers and members of

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[12] The state statutes are compared with the federal in the Appendix, *infra*, pp. 48–56.

[13] See Appendix, *infra*, pp. 48–49.

[14] See Appendix, *infra*, pp. 49–50.

[15] See Appendix, *infra*, p. 50.

crews of vessels on the navigable waters of the United States does not in any manner preclude the State of New York from extending its unemployment insurance benefits to maritime employment.

CONCLUSION

The judgment of the Court of Appeals of the State of New York is correct and should be affirmed.

Respectfully submitted.

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APRIL 1943.

APPENDIX

Comparison of State Unemployment Insurance Laws With Title IX of the Federal Social Security Act (now Internal Revenue Code, Sections 1600–1611), Showing State Coverage of Employment not Reached by the Federal Tax

The provisions of the state statutes are summarized in 1 C. C. H., Unemployment Insurance Service, paragraph 992; 1 P-H, Unemployment Insurance Service, paragraph 20,401. These Services also reprint the state statutes in full and give the official citations.

1. The Federal Act applies only to employers of eight or more employees, Internal Revenue Code, Section 1607 (a). The following States have similar coverage:

Alabama	Michigan	South Carolina
Colorado	Mississippi	South Dakota
Florida	Missouri	Tennessee
Georgia	Nebraska	Texas
Indiana	New Jersey	Vermont
Iowa	North Carolina	Virginia
Kansas	North Dakota	Alaska
Maine	Oklahoma	

Illinois covers employers with 6 or more employees.

The following States cover those with 4 or more employees: California, Connecticut, Kentucky, Louisiana, Maryland, New Hampshire, New York, Oregon, Rhode Island.

Arizona and Ohio cover those with 3 or more employees.

The following cover those with 1 or more employees: Arkansas, Delaware, District of Columbia, Massachusetts, Minnesota, Montana, Nevada, Pennsylvania, Washington, West Virginia, Hawaii.

Utah covers employers whose pay rolls for any quarter total $140 or more.

New Mexico covers those with 2 or more employees or those where pay roll for the year is $450 or more.

Idaho covers those with 1 or more employees if the employer pays $78 or more in wages for a quarter in the calendar year.

Wyoming covers those with 1 or more employees if the pay roll for a quarter in the calendar year totals $150 or more.

Wisconsin covers those with 6 or more employees or, if the records are inadequate, if the employer has a pay roll of $6,000 or more for the calendar year.

2. Internal Revenue Code, Section 1607 (c) (2) exempts—

> Domestic service in a private home, local college club, or local chapter of a college fraternity or sorority.

New York is the only State which does not exempt domestic service in a private home. Domestic service in a local college club or a fraternity is not exempted in the following States:

Delaware	Iowa	Nevada
District of Columbia	Kentucky	New Jersey
	Mississippi	New York

North Carolina	Vermont	Wyoming
Rhode Island	Washington	
Tennessee	West Virginia	

3. Internal Revenue Code, Section 1607 (c) (3) exempts—

> Casual labor not in the course of the employer's trade or business.

The unemployment compensation laws of the following States do not contain this exemption:

Arizona	Maryland	Rhode Island
Arkansas	Missouri	South Dakota
Delaware	Montana	Tennessee
Idaho	Nevada	Texas
Illinois	New Jersey	Virginia
Iowa	New Mexico	West Virginia
Kansas	New York	Wyoming
Kentucky	North Carolina	
Maine	Oklahoma	

The unemployment compensation laws of the following States contain this exemption in a somewhat limited form: Massachusetts, Ohio, Wisconsin.

4. Internal Revenue Code, Section 1607 (c) (10) (A) exempts—

> Service performed in any calendar quarter in the employ of any organization exempt from income tax under section 101, if—
>
> (i) the remuneration for such service does not exceed $45, or
>
> (ii) such service is in connection with the collection of dues or premiums for a fraternal beneficiary society, order, or association, and is performed away from the home office, or is ritualistic service in connection with any such society, order, or association, or

(iii) such service is performed by a student who is enrolled and is regularly attending classes at a school, college, or university.

The unemployment compensation laws of the following States do not contain such an exemption:

Colorado	Missouri	Oregon
Connecticut	Montana	Rhode Island
Delaware	Nevada	Tennessee
District of Columbia	New Hampshire	Vermont
Idaho	New Jersey	Washington
Iowa	New Mexico	West Virginia
Kansas	New York	Wisconsin
Kentucky	North Carolina	Wyoming
	Oklahoma	

5. Internal Revenue Code, Section 1607 (c) (10) (B), exempts—

Service performed in the employ of an agricultural or horticultural organization exempt from income tax under section 101 (1).

The unemployment compensation laws of the following States contain no such exemption:

Arkansas	Missouri	Oklahoma
Colorado	Montana	Rhode Island
Delaware	Nevada	Tennessee
District of Columbia	New Hampshire	Texas
Idaho	New Jersey	Vermont
Iowa	New Mexico	Washington
Kansas	New York	West Virginia
Kentucky	North Carolina	Wyoming
	Ohio	

The following States contain this exemption but in a somewhat modfied form: Connecticut, Minnesota, Oregon.

6. Internal Revenue Code, Sections 1607 (c) (10) (C) and (D), exempts—

> Service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents, if (i) no part of its net earnings inures (other than through such payments) to the benefit of any private shareholder or individual, and (ii) 85 per centum or more of the income consists of amounts collected from members for the sole purpose of making such payments and meeting expenses;
>
> Service performed in the employ of a voluntary employees' beneficiary association providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or their designated beneficiaries, if (i) admission to membership in such association is limited to individuals who are officers or employees of the United States Government, and (ii) no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual.

The unemployment compensation laws of the following States contain no such exemption:

Arkansas	Kentucky	Oregon
Colorado	Missouri	Rhode Island
District of Columbia	Montana	Tennessee
	Nevada	Texas
Illinois	New Mexico	Vermont
Iowa	New York	Washington
Kansas	Oklahoma	West Virginia

7. Internal Revenue Code, Section 1607 (c) (10) (E), exempts

> Service performed in any calendar quarter in the employ of a school, college, or university, not exempt from income tax under section 101, if such service is performed by a student who is enrolled and is regularly attending classes at such school, college, or university, and the remuneration for such service does not exceed $45 (exclusive of room, board, and tuition).

Internal Revenue Code, Section 1607 (c) (13), exempts

> Service performed as a student nurse in the employ of a hospital or a nurses' training school by an individual who is enrolled and is regularly attending classes in a nurses' training school chartered or approved pursuant to State law; and service performed as an interne in the employ of a hospital by an individual who has completed a four years' course in a medical school chartered or approved pursuant to State law;

No such exemptions are contained in the unemployment compensation laws of the following States:

Delaware	Nevada	Utah
District of Columbia	New Hampshire	Vermont
Kansas	North Carolina	Washington
Montana	Oregon	West Virginia
	Tennessee	Wyoming

8. Internal Revenue Code, Section 1607 (c) (11), exempts

> Service performed in the employ of a foreign government (including service as a

consular or other officer or employee or a nondiplomatic representative)

Internal Revenue Code, Section 1607 (c) (12), exempts

> Service performed in the employ of an instrumentality wholly owned by a foreign government—
>
> (A) If the service is of a character similar to that performed in foreign countries by employees of the United States Government or of an instrumentality thereof; and
>
> (B) If the Secretary of State shall certify to the Secretary of the Treasury that the foreign government, with respect to whose instrumentality exemption is claimed, grants an equivalent exemption with respect to similar service performed in the foreign country by employees of the United States Government and of instrumentalities thereof.

No such exemptions are contained in the unemployment compensation laws of the following States:

Colorado	Kentucky	Oregon
Connecticut	Mississippi	Pennsylvania
Delaware	Montana	Rhode Island
District of Columbia	Nebraska	Tennessee
Georgia	Nevada	Vermont
Iowa	New Hampshire	Virginia
Idaho	New Jersey	Washington
Illinois	New York	West Virginia
Kansas	North Carolina	Wisconsin
	North Dakota	Wyoming

9. Internal Revenue Code, Section 1607 (c) (14), exempts

> Service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such person is performed for remuneration solely by way of commission.

This exemption is not contained in the unemployment compensation laws of any of the following States:

California	Nevada	West Virginia
Connecticut	New York	Wisconsin
Idaho	Oregon	Wyoming
Iowa	Rhode Island	
Montana	Vermont	

This exemption is contained in the unemployment compensation laws of the following States but in a somewhat modified form: Colorado, Indiana, Michigan, Ohio, South Carolina, Tennessee, Washington.

10. Internal Revenue Code, Section 1607 (c) (15), exempts

> Service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution.

The unemployment compensation laws of the following States do not contain any such exemption:

California	Montana	Tennessee
Delaware	New Jersey	Vermont
Idaho	New York	West Virginia
Iowa	Rhode Island	

U. S. GOVERNMENT PRINTING OFFICE: 1943

SUPREME COURT OF THE UNITED STATES.

Nos. 722 and 723.—October Term, 1942.

Standard Dredging Corporation, Appellant,
722 *vs.*
Michael J. Murphy, Acting Industrial Commissioner of the State of New York.

International Elevating Company, Appellant,
723 *vs.*
Michael J. Murphy, Acting Industrial Commissioner of the State of New York.

On Appeals from the Supreme Court of New York, Appellate Division, Third Department.

[May 24, 1943.]

Mr. Justice Black delivered the opinion of the Court.

The issue in these cases is whether the New York Unemployment Insurance tax may be collected from employers of certain employees engaged in maritime employment on the wages of those employees. The New York Act levies a payroll tax on all employers of four or more persons, with exceptions not here material, and the sum thus collected is paid into a general fund for the benefit of all unemployed persons covered.[1] The employee in 722 is an assistant cook on a dredge, and the employee in 723 is a grain worker on a floating elevator. The vessels on which both employees served were engaged primarily on work in the waters of the state of New York during the tax period. The appellants challenge the validity of the statute as applied on two grounds: (1) imposition of the tax on maritime employees violates Article 3, § 2 of the Constitution, which gives federal courts exclusive admiralty jurisdiction; (2) Congress has declared either expressly or by implication that no such tax shall be imposed on maritime employers. No other questions of jurisdiction to tax are before us. The

[1] For a description of the New York act see Chamberlain v. Andrews, 271 N. Y. 1, 299 U. S. 515.

New York Court of Appeals overruled both these contentions[2] and the cases are here on appeal under § 237(a) of the Judicial Code.

In approaching this problem, we may put aside two questions at the beginning. It is contended that these two employees are not "members of a crew" and hence are outside the scope both of admiralty jurisdiction and of the relevant statutes.[3] In the view we take, it is immaterial whether or not the employees are crew members. We also need not consider whether these taxes affect interstate or foreign commerce, since Congress has expressly provided that a state shall not be prohibited from levying the tax because the employer is engaged in interstate or foreign commerce, 26 U. S. C. 1600; *Perkins* v. *Pennsylvania,* 314 U. S. 586. The added contention that a vessel's federal license may bar state taxation is only another form of the argument that the tax burdens interstate commerce,[4] and need not be considered separately.

That the state is vested with power to impose taxes in general upon employers to alleviate unemployment, and that the authority of the state is in no wise impaired by reason of blending the imposition of a tax with the relief of unemployment has already been decided by this Court. *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495; *Steward Machine Co.* v. *Davis,* 301 U. S. 548. In a series of cases, however, beginning with *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, this Court called attention to the necessity of uniformity in certain aspects of maritime law, and invalidated several state workmen's compensation acts as applied on the ground that their enforcement would interfere with that essential uniformity. We are now asked to apply the *Jensen* doctrine to the field of unemployment insurance and to invalidate the statute before us on the ground that it is destructive of admiralty uniformity. The effect on admiralty of an unemployment insurance program is so markedly different from the effect

---

[2] 289 N. Y. 119.

[3] The employees here, because of the nature of their work, are arguably not within the scope of that portion of admiralty jurisdiction which has been said to be necessarily exclusive. Cf. Davis v. Department of Labor, 317 U. S. 249. On the other hand, certain decisions of the Bureau of Internal Revenue might provide the basis for contention that these employees are "members of a crew" within the meaning of the federal act. As to whether a dredge is a vessel, see S. S. T. 78, C. B. 1937-1, 408; as to whether a floating grain elevator is a vessel and whether a grain processer is a member of a crew, see S. S. T. 194, C. B. 1937-2, 427; S. S. T. 210, C. B. 1937-2, 429.

[4] Counsel refers us to Gibbons v. Ogden, 9 Wheat 1; Hall v. De Cuir, 95 U. S. 485; Moran v. City of New Orleans, 112 U. S. 69; Helson v. Kentucky, 279 U. S. 245; Southern Pacific Co. v. Gallagher, 306 U. S. 167.

which it was feared might follow from workmen's compensation legislation that we find no reason to expand the *Jensen* doctrine into this new area. Indeed, the *Jensen* case has already been severely limited,[5] and has no vitality beyond that which may continue as to state workmen's compensation laws. Cf. *Parker* v. *Motor Boat Sales*, 314 U. S. 244.

Granting that the federal government might choose to operate its own uniform unemployment insurance system for maritime workers if it chose,[6] "Uniformity is required only when the essential features of an exclusive federal jurisdiction are involved." *Just* v. *Chambers*, 312 U. S. 383, 392. When state compensation laws began to provide a remedy for maritime torts, it was at least arguable that the state remedy interfered with the existing admiralty system of relief through actions such as maintenance and cure. But in dealing with unemployment insurance "exclusive federal jurisdiction" is not affected at all. Congress retains the power to act in the field, and in the meantime, federal courts have nothing to do with it. No principle of admiralty requires uniformity of State taxation. Taxes on vessels and other business activities of operators have previously been upheld.[7] We hold that nothing in Article 3, § 2 of the Constitution places this tax beyond the authority of the State.

The second contention is that the federal Act precludes coverage of these employers by the state. Title 9 of the Federal Social Security Act (26 U. S. C. § 1600-11) taxes employers of eight or more employees but provides for a 90% credit against this federal tax for payments made into a state unemployment fund approved by the federal government. 26 U. S. C. § 1607 exempts from this federal tax certain types of employers of persons including those employed "as an officer or member of the crew of a vessel on the navigable waters of the United States." We do not believe that the exemption of these employers from the federal Act can operate to exempt them from state unemployment insurance taxes. The federal Act, from the nature of its ninety per cent credit device, is obviously an invitation to the states to enter the

[5] Just *v.* Chambers, 312 U. S. 383; Davis *v.* Department of Labor, *supra*, and, for an account of the development of the Jensen doctrine, 252, 253.

[6] Cf. 46 U. S. C. § 688 (the Jones Act, dealing with recovery for injuries by seamen); 33 U. S. C. §§ 901-950 (the Longshoremen's and Harborworkers' Act, dealing with recovery for injuries by longshoremen and harborworkers).

[7] Southern Pacific Co. *v.* Kentucky, 222 U. S. 63; Old Dominion Steamship Co. *v.* Virginia, 198 U. S. 299.

field of unemployment insurance, *Buckstaff* v. *McKinley*, 308 U. S. 358, 363, but the absence of an invitation as to employers of maritime workers is not to be construed as a barrier to state action. These employers appear to have been exempted from the federal Act because of certain administrative difficulties involved in their coverage, and because of some doubt that states could, under the *Jensen* line of cases, constitutionally enter this field;[8] but we are pointed to nothing in the legislative history of the Act which indicates that Congress meant to forbid a state from risking the possible constitutional barriers to state coverage, and undertaking the difficult administrative task. The legislative history of other exemptions may indicate that they were intended to oust the states of jurisdiction—on this question we need express no opinion now; but current administrative practice under the Act indicates that there is nothing in the mere existence of a federal exemption which necessarily required that states not undertake to expand the social security program in this field. The federal Act covers only employers of eight or more persons; approximately one-half the states cover employees with fewer employees. Several states cover casual laborers and domestic servants, both groups exempted by the section of the federal Act which includes the exemption of maritime workers.

Employers of maritime workers, otherwise subject to state unemployment insurance taxing acts, are not excluded from the coverage of such acts either by Article 3, § 2 of the Constitution, or by Congressional enactments.

Affirmed.

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[8] The provision exempting officers and members of crews from the federal unemployment insurance tax are similar to those in Titles II and VIII of the Social Security Act, dealing with the old age retirement pensions. Cf. 53 Stat. 1384, repealing the exemption as to certain maritime workers for old age retirement purposes. The Report of the Ways and Means Committee of the House of Representatives on the original Act indicates that the exception was based on the anticipation of administrative difficulties. House Report 615, 74th Cong., 1st Sess., 33. There was also some fear of possible constitutional objection to state coverage of maritime employees. See statements of Rep. Vinson and Rep. McCormack, 79 Cong. Rec. 5903.

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 723

INTERNATIONAL ELEVATING COMPANY,
APPELLANT,

vs.

FRIEDA S. MILLER, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, AND JOSEPH BERGEN

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

FILED FEBRUARY 11, 1943.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

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[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

In the Matter of The Claim for Benefits under Article 18 of the Labor Law Made by JOSEPH BERGEN, Claimant; INTERNATIONAL ELEVATING COMPANY, Employer, Appellant; FRIEDA S. MILLER, Industrial Commissioner, Respondent

STATEMENT UNDER RULE 234

Proceeding for benefits under the unemployment insurance law on claim of Joseph Bergen, begun by Claimant's Request for Hearing dated May 2, 1940 and service on parties of Notice of Hearing dated May 27, 1940.

After hearing held June 12, 1940, Referee made decision dated July 9, 1940, from which employer appealed to Unemployment Insurance Appeal Board, by Notice of Appeal dated August 5, 1940.

Appeal by employer from decision of Unemployment Insurance Appeal Board dated December 16, 1940, affirming decision of the Referee and finding claimant to be eligible for benefits as determined by the Referee.

Notice of Appeal to this Court filed January 11, 1941.

Claimant appeared in person. The employer, International Elevating Co., appeared by Frank N. Van Emburg, its Assistant Treasurer and Cullen & Dykman, its attorneys. Respondent herein, the Industrial Commissioner, having been represented originally by Harry Rosen, Esq., Legal Bureau, Division of Placement and Unemployment Insurance, is now represented by the Attorney General, John J. Bennett, Jr., Esq. The names of the parties appear above.

There has been no change in the parties or their attorneys, except as herein indicated.

[fol. 2] STATE INDUSTRIAL COMMISSION, DEPARTMENT OF LABOR, DIVISION OF UNEMPLOYMENT INSURANCE

[Title omitted]

NOTICE OF APPEAL TO APPELLATE DIVISION—January 11, 1941

SIRS:

Please Take Notice, that the above-named employer, International Elevating Company, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, from the decision of the Unemployment Insurance Appeal Board, made on December 6, 1940, and dated December 16, 1940, holding that the above claimant worked in employment subject to the Unemployment Insurance Law of the State of New York, and from each and every part of said decision and from the whole thereof, on the ground that the same is contrary to law.

Dated: Brooklyn, New York, January 11, 1941.

Yours, &c., Cullen & Dykman, Attorneys for Employer, International Elevating Company, Office & P. O. Address, 177 Montague Street, Borough of Brooklyn, City of New York.

[fol. 3] To: State Industrial Commissioner, 80 Centre Street, New York, N. Y.; Honorable John J. Bennett, Jr., Attorney General of the State of New York, Albany, N. Y.; Unemployment Insurance Appeal Board (2 copies), 342 Madison Avenue, New York, N. Y.; Joseph Bergen, 7314 Fifth Avenue, Brooklyn, N. Y.; Clerk of the Appellate Division, Third Department, Albany, N. Y.

[fol. 4] BEFORE UNEMPLOYMENT INSURANCE APPEAL BOARD

State of New York

Department of Labor

342 Madison Avenue

New York City

NOTICE OF DECISION—December 16, 1940

S S Number 052 03 7216. Appeal Number ——.

Claimant: Joseph Bergen, 7314-5th Avenue, Brooklyn, New York.

Other Parties: International Elevating Company, 2 Broadway, New York, New York (e); Cullen & Dykman, Esqs., 177 Montague Street, Brooklyn, New York; New York State Employment Service, 512-86th Street, Brooklyn, New York; Mr. Harry Rosen, Legal Bureau, New York City.

Please Take Notice that in connection with the above appeal, a decision was made on December 6, 1940 as per copy of decision annexed.

Dated, December 16, 1940.

Unemployment Insurance Appeal Board, by Louis Perlstein, Executive Secretary.

[fol. 5] BEFORE UNEMPLOYMENT INSURANCE APPEAL BOARD

FINDINGS OF FACT, OPINION AND DECISION—December 6, 1940

Case #3538-40. 533-96-4OR.

State of New York, Department of Labor, Unemployment Insurance Appeal Board.

Re: Name
S. S. No. — Employer No. —.

The employer appeals from the decision of the referee dated July 9, 1940, holding that claimant worked in employment subject to the Unemployment Insurance Law and is entitled to be credited with his earnings therein.

Hearings were held before the referee at which the claimant, the employer corporation, by its assistant treasurer, its attorney and a representative of the Industrial Commissioner were present and were accorded full opportunity to be heard. Briefs have been submitted on behalf of the employer and the Industrial Commissioner for the consideration of the Board.

Based on the record and the testimony in this case, the Board makes the following

Findings of Fact:

Claimant was employed by appellant during 1938 and 1939. There is no dispute as to the length of claimant's employment or as to the amount of his earnings. The ques-

tion in dispute is whether or not claimant worked in employment subject to the law.

Claimant was a ship-trimmer in connection with the handling of grain. His services were performed on floating grain elevators, which are documented under the laws of the United States. These elevators are self-propelled and generate their own power. The function of the elevators is [fol. 6] to transfer grain in bulk between ocean going vessels and canal boats or other boats. The work of the claimant during 1938 and 1939 was the storing and trimming of grain in the holds of the ships.

Claimant was a member of a local union of the International Longshoremen's Association. The employer had a closed shop agreement with said union and only members of the union worked on the grain elevators. Compensation for the services of the union members was measured by a predetermined fixed scale of $5.00 for each thousand bushels handled. The trimmers usually met in a union meeting room on South Street in the City of New York, and if a job was available, all would proceed from the meeting room to the job.

Claimant did not perform any work on the grain elevator until it had been tied up alongside the steamer and the harbor vessel between which the transfer of grain was to be effectuated. Occasionally, after one job was done there was another job to be done on a vessel tied up at a different pier. In that event, claimant had his choice of proceeding by land to the other job or remaining on the grain elevator and being transported thereon, in which event he did not participate in the navigation of the vessel.

Claimant's work was all performed under the supervision of a superintendent in appellant's employ and not under the supervision of the captain of the grain elevator.

While the boat was under way from one pier to another, it was then under the supervision of the captain of the vessel who was a licensed individual.

Claimant did not sign any ship's articles. He was not fed on the ship and when he went to lunch he had to go to a [fol. 7] restaurant situated on the shore. Claimant lived in the Borough of Brooklyn and went home to his residence every night. He worked eight hours a day and any work done thereafter was considered overtime. On a few rare occasions when the claimant was too tired to go home, he

slept on the floor of the boat, as there were no sleeping accommodations on the boat.

It has been conceded by the employer that the greater part of the work performed by the claimant in 1938 and 1939, prior to June 3, 1939, was in the State of New York and that the base of operations after June 3, 1939, was in the State of New York.

Opinion

The issue to be determined herein is whether or not the claimant worked in employment subject to the Unemployment Insurance Law.

It is the contention of the appellant that the claimant was an officer or member of a crew, and therefore comes within the exemption as outlined under the Social Security Act and the Internal Revenue Code, and that under said circumstances the State of New York has no jurisdiction in this case.

Title 9 of the Social Security Act as amended is not contained in the Internal Revenue Code, except Section 904. The Code provides:

"The term 'employment' means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the [fol. 8] United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—

• • • • • • •

(4) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States; • • •" (Section 1607-(c) (4)).

There is no provision in the New York State Unemployment Insurance Law specifically exempting from its provisions an officer or member of the crew of a vessel on the navigable waters of the United States. The Act therefore applies to the claimant unless it is in conflict with some provision of the State or Federal Constitution. The employer contends that as far as the claimant is concerned, the application of the Act to him would bring said Act in conflict with that provision of the Federal Constitution

which grants to the United States Government exclusive jurisdiction over admiralty and maritime matters. We have previously held that the maritime nature of employment in and of itself does not exempt the employer from the provisions of the Unemployment Insurance Law (Appeal Board 1180-39).

There is no question that the grain elevator on which the claimant performed his services was a vessel within the meaning of that term and there is also no question that the waters on which said services were performed were navigable waters of the United States.

Therefore, the question to be decided by us is whether or not the claimant's services were performed as an officer or member of a crew. If we find that such services were per- [fol. 9] formed as an officer or member of a crew, then the appellant must prevail and New York State would have no jurisdiction over the claimant and the employer herein. If, however, we find that the claimant's services were not performed as an officer or member of a crew, then the claimant is an employee, working in employment subject to the Unemployment Insurance Law.

Regulation 90 relates to the excise tax on employers under Title 9 of the Social Security Act, which refers to unemployment insurance tax on employers of eight or more. Article 206(3) of Regulation 90 gives the following definition of "officers and members of the crew":

"The expression 'officers and members of the crew' includes the master or officer in charge of the vessel, however designated, and every individual, subject to his authority, serving on board and contributing in any way to the operation and welfare of the vessel. The exception extends, for example, to services rendered by the master, mates, pilots, pursers, surgeons, stewards, engineers, firemen, cooks, clerks, carpenters, deck hands, porters, and chamber-maids and by seal hunters and fishermen on sealing and fishing vessels."

Since the phrase "officers and members of the crew" is a phrase of exclusion, it must therefore be given a narrow construction. The appellant relies on the case of *The Buena Ventura*, 243 Fed. 797, to the effect that a wireless operator hired and paid by an independent contractor was considered a member of a crew. In that case, the justice presiding

[fol. 10] stated that it was his opinion that a wireless operator was a far more important person in the safe operation of a voyaging vessel than a fireman, cook, or the like, but said:

"It is preferred to put the decision on this broad ground: i. e.; that a man who serves the ship as a result of a contractual relation of any kind, and serves her *in her navigation*, is a member of the crew and entitled to the privileges of a seaman." (*The Buena Ventura*, 243 Fed. 797.) (Italics ours.)

The Justice further went on to give a definition of the word "crew" as follows:

"The word 'crew' is explicitly considered in *United States v. Winn*, 3 Sum. 209 Fed. Cas. No. 16,740. What Justice Story there said has not been improved upon, though the language of Dodge, J. in *The Bound Brook* (D. C.), 146 Fed. at 164 may be quoted as a fair summary:

'When the "crew" of a vessel is referred to, those persons are naturally and primarily meant who are on board her *aiding in her navigation*, without reference to the nature of the arrangement under which they are on board * * *.'" (Italics ours.)

Judge Deadly aptly stated the definition as follows:

"The words 'crews of the vessels' as here used, include all of the ship's company—all the seamen and officers except [fol. 11] the captain (Rap. and Law Dict. Verb. 'crew'—*U. S. v. Winn*, 3 Sum. 209).

"The crew of a vessel—the ship's company—in a general sense, comprises all persons, who, in pursuance of some contract or arrangement with the owner or master are on board the same *aiding in the navigation thereof.*" (*The Marie* (*Dominick Dupee, Libellant*), 49 Fed. 287). (Italics ours.)

It is to be expressly noted, therefore, that in order for the work performed by the claimant in the instant case to come within the phrase "officers and members of the crew" he must contribute to the operation and welfare of the vessel and aid in the navigation thereof.

In the instant case, the claimant did not start to work until the grain elevator was tied alongside the boat either

from which or to which the grain was to be transferred. At that moment the captain relinquished control and the superintendent in charge took over the operation of the transfer of the grain. The work performed by the claimant was merely transferring the grain between two boats. The work performed by the claimant was not essential and did not contribute to the operation and welfare of the vessel as a means of navigation, nor did his work aid in the navigation of the boat.

The claimant never performed any work while the elevator was being transported from one pier to another, but started his work after the elevator had been tied alongside the boat to which the grain was to be transferred.

The claimant belonged to a union of trimmers. They met in a union meeting room in South Street, New York. [fol. 12] They proceeded from said union meeting room to the job, wherever said job was located. They worked eight hours a day and any time spent working thereafter was considered overtime. They were not fed on board ship. It was unnecessary for the claimant or any member of the union to sign ship's articles. Claimant was under the supervision of a superintendent who was a different person than the master of the boat. The master of the boat, the captain, was necessarily a licensed individual and the crew consisted of engineers, firemen and deckmen.

Since we have come to the conclusion that the work performed by the claimant was not in furtherance of the operation and welfare of the vessel as an instrument of navigation, it necessarily follows that the claimant worked in employment subject to the Unemployment Insurance Law.

Decision

Claimant worked in employment subject to the Unemployment Insurance Law and is entitled to be credited with his earnings as fixed by the referee.

The decision of the referee is affirmed.

Dated December 6, 1940.

(S.) I. D. Neustein, Member.

[fol. 13] BEFORE UNEMPLOYMENT INSURANCE APPEAL BOARD

[Title omitted]

NOTICE OF APPEAL TO APPEAL BOARD—August 5, 1940

SIRS:

Please Take Notice that International Elevating Company, Employer herein, hereby appeals to the Unemployment Insurance Appeal Board from the decision of the Referee of the Industrial Commissioner herein, dated July 9, 1940, and from each and every part of said decision.

Dated: Brooklyn, N. Y., August 5, 1940.

Yours, etc., Cullen & Dykman, Attorneys for Employer-Appellant, Office and P. O. Address, 177 Montague Street, Borough of Brooklyn, City of New York.

[fol. 14] To: New York State Division of Unemployment Insurance Local Employment Office, 512 86th Street, Brooklyn, New York; Joseph Bergen, 7314 Fifth Avenue, Brooklyn, New York.

BEFORE UNEMPLOYMENT INSURANCE REFEREES' UNIT

NOTICE OF DECISION, JULY 17, 1940

Please take notice that as a result of a hearing held before an Unemployment Insurance Referee a decision was made, a copy of which is hereto annexed.

Dated July 17, 1940.

Unemployment Insurance Appeal Board, by Samuel I. Kastle, Administrative Referee.

Take further notice that if you are not satisfied with the decision you may appeal to the Unemployment Insurance Appeal Board by calling in person at the local employment office and filing a Notice of Appeal or by writing a letter to the local employment office at 512 86th Street, Brooklyn, N. Y., stating your wish to appeal from this decision.

Such appeal must be taken within twenty days (20) after the mailing or personal delivery of this decision.

[fol. 15] BEFORE UNEMPLOYMENT INSURANCE REFEREES' UNIT

S. S. No. 052-03-7216

Index No. 533-96-40R

Date: July 9, 1940.

Claimant: Joseph Bergen.

Referee: Henry Eisen, at 342 Madison Avenue, N. Y. C., on June 12, 1940.

FINDINGS OF FACT AND DECISION OF REFEREE, JULY 9, 1940

Appearances:

Joseph Bergen, Claimant.

International Elevating Co., Employer, by Frank N. Van Emberg, Assistant Treasurer.

Cullen & Dykman, Esqs., Counsel for Employer, by Robert Lisle, Esq., of Counsel.

Harry Rosen, Esq., representing the Legal Bureau, Division of Placement and Unemployment Insurance.

Issue:

Whether or not claimant's employment is maritime in nature and as such exempted under the provisions of the Unemployment Insurance Law.

From the testimony adduced, the following are the

FINDINGS OF FACT:

The claimant was employed by the corporation hereinafter designated in 1938 and 1939. His duties were those of a "header" or "trimmer" in connection with handling of grain. These services were performed on vessels plying in navigable waters in and about the New York harbor and tributary streams.

[fol. 16] The vessels are known as grain elevators, documented under the laws of the United States. Since the home port is New York City, the elevators are duly registered at the New York Custom House. The hailing port is Jersey City, New Jersey. The floating elevators are self-propelled and generate their own power. Their function is to transfer grain in bulk to ocean-going vessels. This grain is brought to the New York harbor in vessels from other ports. The ultimate destination of the grain is the foreign countries.

The principal handling method involves the use of an elevator leg for direct vertical lifts. An endless chain of buckets scoop up the grain and carry it overhead where it is turned out by inversion of the buckets and dropped into the receiving steamer through a pipe. The work entailed is exclusively related to the handling, transferring and delivering grain in bulk, requiring its weighing, cleaning and storing. Obviously these operations, in the main, represent a commercial occupation rather than a maritime pursuit. In no sense is such a vocation allied with navigation or the welfare of a vessel.

The claimant and co-workers are members of a union. This organization, because of a "closed shop" agreement with the employer is the exclusive source of supply of the grain handlers. Compensation for the services of these workers is measured solely by a predetermined fixed union scale of five dollars per thousand bushels handled.

The elevators have full complements of crews, such as captain, engineers, deckhands, etc. This personnel is distinct from the grain workers. It is significant that when the elevator is navigated, the captain is in full command of the [fol. 17] elevator. When, however, the elevator is engaged in the process of transferring, trimming, weighing and shoveling the grain, the responsibility for supervision is shifted to a superintendent.

The company herein has not filed reports with or paid contributions to the New York State Unemployment Insurance fund, taking the ground that all grain workers are in maritime employment. A ruling made by the Federal Treasury Department takes the position that such employees are members of crews and are excepted from tax liability under Section 811 (b) (5) of the Social Security Act. A similar ruling was made tentatively by a former acting executive director of the Division of Unemployment Insurance, which however was conditioned upon further information requested from the company, but not subsequently supplied.

These ex-parte determinations are not binding upon the claimant. It becomes necessary, therefore, to examine the facts and circumstances to ascertain whether in the instant case, the maritime law has such exclusive jurisdiction as to exempt grain trimmers from the benefits provided in the Unemployment Insurance Law.

The Unemployment Insurance Act is silent with respect to maritime workers. Nevertheless interpretation may not be made that would be in conflict with the provisions of the Constitution of the United States which empowers Congress to legislate with respect to maritime and admiralty matters.

An intrastate tax designed to add a formalized right to wage earners of the instant type who become unemployed through no fault of their own is not in contravention of the substance of admiralty laws. The Unemployment Insur- [fol. 18] ance Act is part of social reforms approved and encouraged by the United States Government. To exclude from coverage a large class of workers who take no part in the navigation of vessels would seem inconsistent with and indeed a negation of the intent to bring all industrial workers within the protection of the Unemployment Insurance Law against the hazards of unemployment, except those specifically exempted by the Act. It is the function of the State to designate the choice of beneficiaries. In the selective process, it is the status and nature of the work which must be given due emphasis, rather than some obscure construction of the maritime law. Thus the opinion is held that no valid reason exists for placing the workers herein considered in the same category as officers and members of crews of vessels. A similar conclusion was reached by the Appeal Board with respect to dredge workers (Case 1180-39).

The earnings are not in dispute. The employer who is subject to the Unemployment Insurance Law, submitted wage credits corresponding to the sums tabulated herein. It is conceded also that the greater portion of the work performed was in the waters adjacent to the State of New York. This data is detailed in an affidavit filed in the claims folder and made part of the record, and supplements the evidence adduced.

Based upon the record and testimony, the amounts as set forth herewith are allowed:

	1938			
	First Quarter	Second Quarter	Third Quarter	Fourth Quarter
International Elevating Co., 2 Broadway, N.Y.C.	305.18	110.82	279.21	195.23
	1939			
	143.80	8.53	185.71	416.03

[fol. 19] DECISION:

Upon all the evidence, I find that the claimant is not an officer or a member of a crew of a vessel. His employment is not exempted under the provisions of the Unemployment Insurance Law. The employer herein is liable for tax contributions on his wages and the wages of all others similarly situated. I also find that the claimant had earnings in covered employment in the sums as herein tabulated and is entitled to benefit rights based upon these figures, subject to local office records as to weeks of total unemployment.

Copy of this decision is being forwarded to the Bureau of Tax and Wage Records for the collection of contributions due.

Henry Eisen, Referee.

Joseph Bergen, 7314 Fifth Ave., Brooklyn, N. Y.
International Elevating Co., 2 Broadway, N. Y. C.
Harry I. Rosen, Esq., 342 Madison Ave., N. Y. C.
Cullen & Dykman, 177 Montague Street, Brooklyn, N. Y.
533-96-40R (1)
L. Goldberg, Bk. 347/6/12/40.
E. Taylor, Bk 197, 7/8/40.

[fol. 20] State of New York

Department of Labor

Division of Placement and Unemployment Insurance

REQUEST FOR HEARING ON INITIAL DETERMINATION—May 2, 1940

Local Office No. 533.

Claimant Joseph Bergen, Address 7314-5 Ave., B'klyn.
S. S. Acct. No. 052-03-7216

I request a hearing on the issue of: Earnings, X 1938. Coverage, X 1939.

Reason for Contest: I claim the following earnings in employment subject to the New York State Unemployment Insurance Law in addition to the earnings on which my Initial Determination dated —— was based.

Employer, International Elevating Co. Address Produce Exchange Bldg. N. Y. C. Add'l. Money Wages in

Each Quarter, $890.44-1938; $754.10-1939. Other Remuneration in Each Quarter ——.

Initial Determination was based on following earnings:

Employer	Total Wages and Other Remuneration in Each Quarter
.....	.....
.....	.....

Signed Joseph W. Bergen, Sr., Claimant.

[fol. 21] Additional Information: (Names and addresses of other persons, witnesses, co-workers, union, etc., to be notified of hearing.)

See Employer's answer to E. S. 11 Re: Coverage.

Claimant states that he worked on ships tied up at dock, loading & unloading grain.

L. W. Jeffries (Insurance Manager or Deputy), 512-86 St., B'klyn (Address).

[ ] Contest on Original Claim.

Check box if contest has arisen subsequent to filing of Original Claim, ES-333, but prior to filing of Additional Claim, ES-333.5.

[fol. 22] Before Unemployment Insurance Referees' Unit

S. S. No. 052-03-7216

Notice of Hearing—May 27, 1940

Claimant: Joseph Bergen, 7314 5th Ave., Bklyn, N. Y.

Other Parties: International Elevating Co., 2 Broadway, N. Y. C.

Harry I. Rosen, Esq., Legal Bureau Building.

You are hereby notified to appear on June 12, 1940 10:00 at 342 Madison Avenue, Room 1008, New York City, before Referee Henry Eisen.

Purpose of Hearing: To determine whether claimant worked in employment subject to the law and claimant's correct 1938 & 1939 earnings.

Important! To all Parties:

You must bring to this hearing your witnesses, if any, and all evidence that has a bearing on this case, including all pay records, books, statements of earnings, et cetera.

Unemployment Insurance Appeal Board, By Samuel I. Kastle, Administrative Referee

rs-1

[fol. 23] BEFORE UNEMPLOYMENT INSURANCE REFEREES' UNIT

[Title omitted]

MINUTES OF HEARING—June 12, 1940

Social Security Number: 052-03-7216
Index Number: 533-96-40R

Date of hearing: June 12, 1940.
Place of hearing: 342 Madison Avenue, New York City.
Before—Henry Eisen, Referee.
Libby Goldberg, Hearing Stenographer.

APPEARANCES:

Joseph Bergen, Claimant.
International Elevating Co., Employer, by Frank Van Emburg.
Cullen & Dykman, Esqs., Attorneys for Employer, by Robert Lisle, of Counsel.
D. P. U. I., by Harry Rosen, Esq.

Case duly called.

[fol. 24] FRANK VAN EMBURG, having first been sworn, testified as follows:

By the Referee:

Q. What company do you represent?
A. International Elevating Company, 2 Broadway, New York City.
Q. In what capacity?
A. Assistant treasurer.
Q. And you are familiar with the employment record of the claimant, Joseph Bergen?
A. Yes.

Q. While with your company?

A. Yes.

Q. What type of work did he do?

A. He was called a trimmer. That means that he handled the grain in either canal boats or harbor boats or the ocean going vessels. We transfer grain from a harbor vessel to an ocean going vessel and vice versa. That is our business, just transferring the grain.

Q. When did the claimant commence working for you?

A. I can't say as to that but you asked for '38 and '39 earnings which I brought. I didn't go back further.

Q. During what period in 1938 did he work for your company?

A. 1938 he worked in January. He worked every month in 1938.

Q. What were his earnings for January, February and March?

A. January, $91.82, February, $141.57, March, $71.79.

Q. Let me have the earnings for April, May and June.

A. April, $61.29, May, $31.84, June, $17.69.

Q. July, August and September.

A. July $62.53, August, $90.49, September, $126.19.

Q. No, October, November and December.

A. October, $99.69, November, $31.42, December, $64.02. Do you wish the total?

Q. Yes.

A. $890.44.

Q. Did he work in 1939?

A. Yes, he did. He worked in January, February and [fol. 25] March, 1939 and we have one payroll in April. He didn't work again until September, October, November and December.

Q. Give me the figures for January, February and March, please.

A. January, $42.12, February, $61.19, March, $30.52, April, $8.53. September was the next month in which he earned anything, $185.17, October, $124.93, November, $103.90, December, $187.20; total for the year was $754.10.

Q. Can you describe in detail the particular work that the claimant did?

A. Well, maybe I better say what our elevator is in the first place to give you a better idea. The elevator consists of a vessel, one hundred feet long, with a tower in the center. On one side is what we call a leg suspended from a yoke

and this leg dropped in the grain vessel or harbor vessel and consists of an endless chain of buckets and these buckets pick up the grain from grain boats and take it up in the elevator. The trimmers handle steam shovels in the hold of the harbor vessel. The steam shovel is controlled by power in the elevator. They place this shovel in position and the power pulls it up takes the grain up to the leg. Now, you have the grain going, if the elevator is weighed, and dropped into the steamer through a pipe and in the vessel, in the steamer, these men also handle this grain with shovel or scoop. The grain falls into the shovel or scoop and they can throw it maybe fifty, seventy-five feet to whatever part of the hold has to be stowed. That's what the work consists of.

Q. Who owns the vessel?

A. International Elevating Company.

Mr. Lisle: May I interrupt? Did you mean the elevator or the grain vessel?

[fol. 26] Q. Well, the elevator and the grain vessel.

A. You mean the harbor vessel?

A. Yes.

Q. Yes.

A. That belongs to anyone.

Q. The elevator is owned by your company?

A. The elevator belongs to our company. The grain boats, the harbor boats can come from the canal, railroad, any place. They are brought up along side of our elevator that lies along side of the steamer with the elevator between it, pick the grain up from the boat and drops it into the steamer.

Q. The elevator is stationed there?

A. It's a floating elevator.

Q. Is the elevator self-propelled?

A. Some are and some are not. We move the elevators around to alongside the steamers where they want to load grain.

Q. Is it movable from the shore by any means?

A. From the shore? I don't quite get what you mean.

Q. The elevator, can it be moved from the shore by means of rope or things?

A. Tugboat on a scow.

Q. Not by means of any wires or ropes?

A. Oh, no. That's not our method.

Q. Now, what was the claimant always stationed on the elevator in the hold as you say?

A. He is not stationed on the hold. He sometimes works on the elevator. You're Joseph Bergen? I'd know you. You are the son. They sometimes work on the elevator or work in the hold of the grain boat or in the hold of the steamer.

Q. How does the claimant reach the elevator?

A. Reach it?

Q. Yes.

A. I don't know how he reaches it—the same as anybody else when they go to their work. Is that what you mean?

[fol. 27] Q. Does he reach it by means of a boat?

A. Oh, no. He goes down the pier.

Q. You say the elevator is stationed in the water, is that right?

A. Stationed where?

Q. You stated that the elevator is stationed in the waters?

A. We place the elevator wherever it is ordered to go to unload grain.

Mr. Rosen: May I ask a question, Mr. Eisen?

Q. When the grain is being loaded is the elevator tied to the dock or out in the harbor or where?

A. It is tied to the dock. The elevator is attached to the steamer and the grain boat is outside the elevator. The three lay right in line against the pier.

Q. Has the claimant any quarters in the elevator?

A. Nobody sleeps in the elevator but we have quarters in the elevator for the trimmers. Right? We have quarters there which they occupy. Nobody sleeps on the elevator. It is a day job. All the employees live nearby and we don't go out the harbor.

Q. And they return to their home at the end of the day's work?

A. Yes and come back in the morning.

The Referee: Did you want to question, Mr. Rosen?

Mr. Rosen: Yes, please.

By Mr. Rosen:

Q. When a vessel is being loaded by grain, will you explain to us this. Is the vessel, the big vessel, moored to the docks?

A. Yes.

Q. Is the elevator moored to the docks?

[fol. 28] A. The ocean going vessel is moored in the dock. The elevator is attached to the steamer by line.

Q. Is it also attached to the dock by line?

A. No. The grain boat is attached to the elevator by lines. They are held in position there together.

Q. So, first you have the big vessel, then you have the elevator and then the grain boat. Is that correct?

A. Yes.

Q. When the trimmer wants to get on the elevator from the pier does he have to take a small boat to get there?

Mr. Lisle: He is already on the elevator.

Q. He is on the elevator before it starts the operation?

A. He is very often. If he isn't he goes over the steamer.

Q. Before the operation starts where is the elevator? Is that also moored to some dock?

A. We have a pier in Jersey City, foot of Morris Street, where we keep our boats when they are not working. We receive an order, then we order the elevator out to the pier in which it is going to work.

Q. Assuming the vessel to be loaded is at one of the piers on the New York State side of the river or the bay, where is your elevator? Do you tow it from New Jersey over here?

A. Oh, yes.

Q. You never dock the elevators in New York?

A. No.

Q. How many elevators do you have?

A. Eight.

Q. Are they documented vessels?

A. Documented vessels under the laws of the United States in the Customs Office.

Q. Where is the home port of these vessels, if that's necessary?

A. The home port, I suppose, is New Jersey. Isn't it?

Q. I don't know. Do you happen to have it?

[fol. 29] A. They are documented, they are registered in the Customs Office. Where would the home port be?

Q. I don't know. Have you licenses with you?

A. No, I haven't.

Mr. Lisle: I should think it would be Jersey City.

Mr. Bergen: That's the home port. That's where the boat comes from.

Q. During the two years involved in this proceeding, was Mr. Bergen working on the same elevator?

A. The same elevator? I think so. You might ask Mr. Bergen?

Q. I will ask him that after.

A. I am not sure of that.

Mr. Lisle: Mr. Van Emburg's is second hand information. He had to ask the superintendent, I think.

A. The trimmers each have their own elevator. When the elevator goes out the same trimmers go aboard. They are just the same part of a crew as the fireman.

Q. Mr. Van Emburg, will you tell us something about the hiring of the trimmers? How did you hire the trimmers?

A. They belong to a union, local union of the I. L. A. and we don't hire them individually. The union supplies the number of men agreed upon for each elevator. There is a boss trimmer and we can't pick our men. We take the gang as they give it and they are always the same. If we are busy there might be some changes but the same men stick to the same elevator.

Q. If the elevator isn't busy did you still pay the trimmers?

A. Oh, no.

[fol. 30] Q. They are paid how?

A. By piece work.

Q. What do you mean by piece work?

A. So much per thousand bushels.

Q. How did you pay them?

A. Five dollars per thousand bushels. We pay them once a week.

Q. And has Mr. Bergen's work with the company been rather steady? I presume so from this record.

A. It's steady—when we had work to do. The last four, five years our business has been very bad, losing money all the time and we didn't have work, they didn't work.

Q. Now, tell us, Mr. Van Emburg, where does that work take place? Where are those boats located, where does the loading take place?

A. On the river, might be around Brooklyn. It's always on navigable waters of the United States.

Q. It is the contention of the Industrial Commissioner that navigable waters of the United States within the territorial limit of the State of New York, that with regard to such employment the New York State Unemployment Insurance Law has jurisdiction. In other words, that we can tax employment on the navigable waters of the United States provided it is within the territorial limits of the State of New York. That is why I am asking you the employment of Mr. Bergen. Can you tell just where that took place, was it on the Hudson River, on the New York side?

A. The record I have here—I can't tell—that would be considerable investigation to determine just where he did work every day to find out which earnings were which.

Q. You make up payrolls, do you not? I don't mean you, I mean your organization.

A. Yes.

Q. And that payroll presumably has all the data necessary for your accounting purposes?

A. The payroll has on it only the number of bushels done during the week.

[fol. 31] Q. Doesn't it have the elevator on it?

A. The elevator—no.

Q. And the vessel loaded?

A. No, just the boats from which the grain was received.

Q. I am sure, Mr. Van Emburg, that your accounting department or payroll department could do the same for us here as other steamship companies have—give us definite information as to where the particular boat is located.

A. Of course, we have that information.

Q. I know you have because all the companies do.

A. I know but it is not consolidated in one place that we could say that was earned in New York and that in New Jersey. That one item $59.81, part of it might have been earned in New York and part in New Jersey. It's all spread out. The elevator might move from one place to another on different jobs.

Q. Let me ask you this. Is your company a covered employer within the meaning of our law. Have you a registration number from our Albany office?

A. We have a registration number for our office employees. These men we considered part of the crew. Each one

is necessary to the operation of our elevator; we couldn't transfer the grain without everybody on board; we would be out of business.

Q. Who is in charge of an elevator?

A. We have different superintendents.

Q. I know.

A. R. M. Pollack, general of the seniors.

Q. I don't mean the name, I mean his record.

A. A superintendent—he could be called master.

Q. Does he have need of a master's ticket, in other words, to operate one of those?

A. Oh, no. He doesn't need a master's ticket.

Q. Do you have regular crews signed on for these elevators, crews similar to crews on an ocean going vessel?

[fol. 32] A. We have captains, engineers, firemen, deckmen.

Q. When these trimmers are hired and assigned to an elevator do they have to sign the articles just the same as deckmen or engineer?

A. The deckhand and engineer don't have to sign any articles as far as I know.

Q. Does the trimmer require any license or certificate to do his work?

A. No. The engineer of the propeller, captain——

Q. I am talking about the trimmers. Do they require a license of any kind?

A. No. They are not certificated.

Q. They are all union men, I presume?

A. All union men.

Q. All you need to complete your complement of trimmers is to call the union and have them send competent trimmers. They require no license or certificate or statement of any kind certifying to their ability to do that work?

A. No.

Mr. Rosen: Mr. Eisen, I will have to ask for an adjournment of this case and ask Mr. Van Emburg to produce the boat licenses, whatever it is called.

Mr. Lisle: Find out the home port.

Mr. Rosen: I'd like to see the licenses itself.

Mr. Lisle: Wouldn't it be sufficient if Mr. Van Emburg would send you a letter with that information?

Mr. Rosen: I want information on what boats Mr. Bergen worked on this position, where they were located and the

times he worked with relation to the geographical outline of the harbor and river.

Mr. Lisle: Might it be more convenient for you to have a [fol. 33] statement prepared and sent to you or would you want an opportunity to examine?

The Referee: I believe we should continue with the hearing and get the testimony of the claimant on that very point and see what information he can give us.

Mr. Rosen: All right, Mr. Eisen.

The Referee: Then if an adjournment is needed you can request it later.

Mr. Rosen: The request of an adjournment will be needed by us in this matter.

By the Referee:

Q. Did the claimant in any way contribute to the welfare of the vessel?

A. Yes.

Q. In what way?

A. They handle lines and tie up the vessels at times, not always.

Q. You wouldn't consider him a member of the crew of the vessel?

A. Positively.

Q. Now, can you tell me whether or not the work performed by the claimant was adjacent to the New York harbor or any other place?

A. What's that?

Q. Adjacent to New York harbor?

Mr. Lisle: I am sorry. I have to object to that question. I don't know what it means.

A. I don't know either.

Q. Well, whether the work performed was on an elevator that was adjacent to New York harbor or any other place. Does that clear up the question?

Mr. Lisle: I don't quite understand what you mean by [fol. 34] "adjacent to New York Harbor".

The Referee: In New York water.

Mr. Lisle: I think the witness has already testified that all the employment of this claimant was on vessels on navigable waters of the Harbor of New York. Is that so, Mr. Van Emburg?

Mr. Van Emburg: Yes.

Mr. Lisle: Does that answer your question?

Mr. Rosen: I want a definite statement in the record as to actually where the different vessels on which Mr. Bergen worked during the period involved here were located, when they were loaded at Pier 43 North River, were they at the Battery, were they in Jersey City. I want to know exactly where they were then we can determine whether they were in the territorial limit of New York or not.

Mr. Van Emburg: You want that for every dollar earnings in these two years?

Mr. Rosen: Yes, I would.

Mr. Van Emburg: It is a mess, I tell you, to dig that up.

Mr. Lisle: These vessels, these elevators are really in a different case from the ships of the ordinary coastwise and transatlantic steamship companies because they don't tie up at any given pier. They go from place to place and sometimes two or three places in one day.

Mr. Rosen: But the elevator doesn't follow it around.

Mr. Lisle: Yes. The elevator moves from place to place.

[fol. 35] Mr. Rosen: The same ship?

Mr. Lisle: No. Any ship, the greater part of the business of the International Elevating Company is small elevations.

Mr. Van Emburg: Small lots, eight or sixteen thousand bushels. It takes us an hour or two to do the work and then we move to another pier, another steamship.

Mr. Lisle: It is a convenience to the steamship not to go and have to tie up at a pier at which there is a fixed elevator on the pier. It saves them going to such places and also some of these ships can't pull up beside the elevators. I presume their draft is too much. I don't know.

By the Referee:

Q. Did the claimant do any shore work at all?

A. Not at all—never worked on shore—not for us.

Q. How many men work on an elevator?

A. Well, about thirty-five.

Q. And all the men are members of the union?

A. The superintendent is not a member of the union. The rest are, I think.

Q. Have you contractual relations with the union?

A. Have we? Yes, we have.

Q. It is a closed shop?

A. Yes, it is.
Q. They supply all the men for the elevators?
A. Yes.
Q. And you pay according to the fixed union scale?
A. Fixed scale, according to an agreement.
Q. So many dollars per thousand bushels, is that it?
A. Yes.
Q. That's how much?
A. Five dollars per thousand straight time.

[fol. 36] The Referee: Do you want to question?
Mr. Lisle: There isn't much that I think I can question.
Mr. Rosen: I want to ask one series of short questions.

By Mr. Rosen:

Q. You know the name of one of these elevators that Bergen worked on?
A. "Themis".
Q. Give me the rank or the names of the jobs of the crew of all the personnel of that "Themis". There is a superintendent.
A. That's right.
Q. Then what?
A. Superintendent, millwright captain, engineer, fireman, deckhand, watchman and then twenty-eight trimmers, sometimes twenty-eight, sometimes less than twenty-eight —it varies a little—men can't always be reached you know at times might be twenty-seven or twenty-six.
Q. What is the duty of the captain?
A. The duty of the captain, steers the propellers around the harbor.
Q. Is he licensed?
A. He is a licensed captain, yes.
Q. He is a licensed captain?
A. Licensed captain, propeller.
Q. Is he a master within the ordinary meaning of the term in seafaring expressions?
A. I think so. He must be to get a license.
Q. Is he in charge of the elevator?
A. He is in charge of the elevator when it is moving on the water.
Q. And when the loading is being carried on, from one boat to another, is he in charge of the elevator?
A. No. The superintendent is in charge of everything.

[fol. 37] Q. Of the regular crew under the captain, who comprises that crew if there is such a thing?

A. Why, while the vessel is moving on the water, do you mean?

Q. Yes, when the master is in charge?

A. Well, the entire crew, the entire number of employees.

Q. All that you mentioned?

A. They are all subject to the orders of the superintendent, at all times. Of course, as far as navigation is concerned, the captain navigates the vessel but as far as going here, there, somewhere else, he is under orders of the superintendent or master.

Q. Superintendent or master. Did you say superintendent or master?

A. Whatever you want to call him. You sometimes say a master. The master is the man who has charge of the operations, controls all the employees on board.

Q. Mr. Van Emburg, when you say master do you mean the superintendent or the captain?

A. I mean the superintendent.

Q. Is he a licensed master?

A. Oh, no. He isn't a licensed master, not in the common sense of the word. Master means a man that operates a vessel, controls it.

Q. Yes.

A. He doesn't control the actual operation of the vessel around the harbor.

Mr. Rosen: Do you happen to know whether there are regular crew articles signed for these elevators?

Mr. Lisle: I don't know one way or the other but I have the impression from Mr. Van Emburg's previous testimony that they don't sign articles. I think he so testified.

[fol. 38] By Mr. Rosen:

Q. Where does the power come from that operates these buckets?

A. Power on the elevator steam engine or diesel engine.

Q. Regardless of whether or not one of these elevators is self-propelled, it still has power on it to operate these buckets?

A. Yes.

Q. Do the vessels move that power itself?

A. We have a generator, steam capstan.

Q. No connection, no lines connecting the vessel with the line in order to get power?

A. Oh, no.

The Referee: You have your own generator on each vessel?

A. Yes.

Mr. Rosen: I have no further questions for the moment, Mr. Eisen.

By the Referee:

Q. From what point are these grains delivered?

A. From what point?

Q. Yes.

A. It might come from the canal, Buffalo, it might come from the west shore, the Lackawanna. It is immaterial to us where it comes from. Grain and a harbor vessel put alongside our vessel. We don't care where it comes from.

Q. Your company has no interest in the vessels that bring in the grain?

A. No, nothing at all. No interest whatever. We transfer, that's all.

Q. Where do you operate principally, in what harbors do you operate?

A. New York harbor.

[fol. 39] Q. That is your principal harbor?

A. We don't go out of New York harbor.

Mr. Rosen: Did you go up the Hudson River part way, the East River or do you——

A. We go up the North River and East River.

Q. That's still adjacent to New York?

A. I call that New York harbor.

Mr. Rosen: There is the harbor itself and the rivers while adjacent to the harbor are not part of the harbor.

Q. What I am trying to bring out—it's adjacent to New York State—that's your principal work?

A. We don't go outside.

Q. You don't go on the Jersey side?

A. Oh, yes.

Q. But the principal work is in New York State?

A. I can't say that.

Q. What can you say?

A. I haven't any figure to indicate how much work is done in New York or how much in New Jersey.

Q. What proportion, just as a rough guess?

A. The only figure that I have on it is the figure that we make for New York State franchise tax and that according to where the elevators are on each day of the year, regardless of work—it is about ten per cent New York and ninety per cent New Jersey—but that isn't working all the time.

Mr. Rosen: Would you repeat what you said a moment ago. Would you read Mr. Emburg's answer. I was thinking of something else.

[fol. 40] (Stenographer reads Mr. Van Emburg's answer.)

By Mr. Rosen:

Q. From those records, Mr. Van Emburg, couldn't you tell us where the elevators were working on each day of the year?

A. Oh, yes. We have the records.

Q. Couldn't you pick out the elevators on which Mr. Bergen was working in the two years in question and give us the place?

A. We could.

Q. Is that much of a job?

A. I say it is.

By the Referee:

Q. You seem to make a distinction between the place where the elevator is stationed and the work performed?

A. Yes.

Q. How do you distinguish the difference there?

A. Well, we have to segregate the assets for New York State franchise tax. Wherever the elevator is is where the asset is on any particular day.

Mr. Lisle: May I ask one question?

The Referee: Yes.

By Mr. Lisle:

Q. When you say the elevator is in a certain place on a certain day, do you mean that that is the place where it spent most of the time?

A. Do you mean most of that day?

Q. Or do you mean it spent the entire day there?

A. Well, I couldn't say that. I couldn't say exactly—it moves from one place to another in a different day.

[fol. 41] Q. When railroads have to say where their freight cars are they figure out what they call an average daily presence in a definite state and notwithstanding the fact that a particular car might have been in two states in a given day they say it spent their entire day in one state. It is a simple way of deciding theoretically where the property is. Is that the theory you proceed on?

A. Well, I think the theory we proceed on is that we consider if it was in New York any part of the day that day goes to New York.

Q. I see.

A. After the elevator is through work they'd go to the pier in Jersey City.

By the Referee:

Q. Am I to understand that the work performed is principally in New York but for the purposes of the franchise tax you list the assets of the elevator and so forth with respect to Jersey. Is that what you mean?

A. Oh, no. I can't tell you what percentage were performed in New York and New Jersey in actual work. You'd have to figure down to the hours, hours occupied in working, wouldn't you, in New York and New Jersey?

By Mr. Rosen:

Q. But, Mr. Van Emburg. you stated a moment ago on the record when the boat isn't working, your boat, the elevator, is moored in Jersey?

A. Jersey City.

Q. So if your record shows that that boat at any time was in New York then that boat presumably was working at the time?

A. If it was at any time in New York, you say?

Q. Certainly. If the record shows the boat was in New [fol. 42] Jersey it wasn't working presumably?

A. Yes.

Q. Or anywhere out of the home port or home dock it must have been working?

A. Right, unless it went to drydock.

Mr. Lisle: I think Mr. Van Emburg misunderstood the first part of that question. When you say the boat is in New Jersey it doesn't necessarily mean that the boat is not working?

A. Not necessarily.

Mr. Lisle: It may or may not be working?

A. Yes.

Q. But if the boat is in New York it is unquestionably working?

A. Generally speaking, yes. There might be exceptions.

Q. There is another thing I'd like to ask you. How long does it take to load or unload one of these grain ships?

A. One of these grain boats?

Q. Yes.

A. One elevator can do around twelve thousand bushels an hour. If a grain boat has thirty thousand bushels in it while it is a simple——

Q. Does it ever happen that the elevator worked all day and all night unloading?

A. It has happened—rush jobs.

Q. I see. All right.

By the Referee:

Q. Where is that grain ultimately consigned to?

A. Any foreign port, Europe.

Q. Is it all to foreign trade?

A. Yes.

Mr. Lisle: Don't you have import work sometimes, Mr. VanEmburg?

[fol. 43] A. We have import work, loading grain out to foreign ports; we unload vessels also.

Mr. Lisle: I want to ask Mr. Van Emburg one question.

By Mr. Lisle:

Q. I understood in the past that you would occasionally be called upon to load or unload vessels lying in anchor?

A. Lying at anchor?

Q. Yes.

A. We have done that.

Q. And you will do that?

A. We can do that if the right position that we can handle it. It is a little too rough.

Mr. Rosen: You mean an anchor in the open waters of the harbor?

Mr. Lisle: That's right.

A. That's right.

By Mr. Rosen:

Q. How often does that happen?

A. Maybe once in ten years or so. I don't remember one case in the last twenty years. It might be more, I can't remember.

Q. The number of times that may occur is so rare that we could disregard it for this purpose?

A. Probably.

JOSEPH BERGEN, having first be-n duly sworn, testified as follows:

By the Referee:

Q. For whom did you work in 1938?

A. 1938, the International Elevating Company.

[fol. 44] Q. What kind of work do yon do?

A. I was a header on a ship.

Mr. Van Emburg: That's part of the trimming, isn't it, Joe?

A. Yes.

Q. Did you keep a record of your earnings in 1938 and 1939?

A. This was—this is 1940 these slips.

Q. You haven't answered my question. Did you keep a record for 1938 and 1939?

A. No, I have no record.

Q. Do you know how much you earned in those years?

A. No, I couldn't tell you that.

Q. The employer's records shows that you earned $809.44 in 1938 and $754.10 in 1939. Does that sound approximately right?

A. (No response.)

Q. Do you accept those figures as being correct?

A. Yes, sure.

Q. Could you describe to me briefly the type of work that you did?

A. Well, when a hold of ship is fill up in grain—you let the grain raise up in the hatch, you understand, in the hatch of the ship. Then the header would spout down the shoot the grain to the back of the hold to the bulkhead and then a man goes down with the board and takes it off and gets it to the far of the head and you can shovel it back.

Q. Am I to understand that all your work was in connection with the grain?

A. All my work is in connection with the grain. I have got about a hundred years' experience.

Q. Did it have any connection with the welfare of the vessel at all?

Mr. Lisle: I object to that.

The Referee: Overruled.

[fol. 45] A. We have men outside known as the trimming gang. The trimming gang is the gang that handles the grain.

Q. How did you reach the elevator each day?

A. It all depends. Most of the time we'd be sent to the Pier K or down to 5th Street or over to the American Export Lines. We go down the dock and over the ship and down the ladder and on the elevator.

Mr. Van Emburg: Don't you handle lines in any elevator?

A. Sometimes but——

Q. You mean those lines to shift the boat?

A. That ties the elevator to the ship.

Mr. Van Emburg: Don't you shift the grain boats too?

A. Yes, that comes under the heading of grain handle.

Mr. Van Emburg: You shift another by hand up to the position we need it in.

Q. Now, you return home every day after work?

A. Yes.

Q. What are your hours?

A. Eight hours is considered to be straight time. Anything over that is overtime.

Q. You never slept on the boat?

A. I did but I was too damn tired to go home.

Q. Is there a place to sleep on the boat?

A. Oh, yes, but there ain't what you call a bed or anything like that. You go and lie on the floor. You're too tired you don't care where you lay.

Q. Did you ever perform any work on the Jersey side?

A. Yes.

Q. What proportion, if you know, of the work that you [fol. 46] performed was on the Jersey side compared to New York?

A. You do a lot of work on the Jersey side.

Q. Can you estimate the proportion?

A. I couldn't estimate the proportion. No—you go to 5th Street—you might be there today, you might be there an hour and maybe two days or maybe a week.

Q. Where did you do most of your work, New York or New Jersey?

A. Mostly 5th Street, mostly around Jersey and New York—all around the harbor.

Q. What harbor do you have reference to?

A. New York harbor.

Q. Would you say it is mostly in New York harbor?

Mr. Lisle: I object.

A. I wouldn't say it is mostly in New York.

The Referee: These hearings are stripped of all technicalities.

Mr. Lisle: I think Mr. Bergen has answered the question as well as he can. If you could get him to say that it was mostly in New York it wouldn't be worth anything.

The Referee: I am not trying to lead him. I am trying to clear up the evidence.

A. (Continuing.) The work is done all around the harbor of New York City. From my understanding is that the elevator is not allowed to go up any further than Yonkers but how far up the East River they can go I don't know.

The Referee: Would you want to question Mr. Bergen?

[fol. 47] By Mr. Rosen:

Q. What elevator did you work on in 1938?

A. "Themis."

Q. Always the same?

A. (No response.)

Q. In 1938 did you always work on the "Themis" or did you work on any other elevator?

A. I think I worked on the "Themis." I am not quite sure—I think I worked on the "Themis" for over four, five years.

Q. Up to the present time?

A. Up to the present time. I can still go back there tomorrow if I am able to work.

Q. Mr. Bergen, is the "Themis" a self-propelled vessel?

A. Yes.

Q. It doesn't require a tug to take it from place to place?

A. No.

Q. Did you sign any articles, ships articles?

A. No.

Q. Do they feed you on the ship?

A. No.

Q. Where do you go to have your lunch?

A. Up to the restaurant.

Q. Where is the restaurant? Is it on the ship?

A. It is on the shore.

Q. How did you get from the elevator to the restaurant?

A. I don't have to go to the restaurant.

Q. How did you get from the elevator——

A. Down the gangplank, up the dock and to the restaurant.

Q. By foot?

A. By foot.

Q. Where do you live, Mr. Bergen?

A. I live 7314 Fifth Avenue, Brooklyn.

Q. Did you ever join your trimming crew on the ship or on the "Themis" when it was laid up or when it was stationed in New Jersey?

A. No. No, the trimming gang never go aboard the elevator in Jersey City unless they want to hang around.

[fol. 48] Q. Where do you join them?

A. We go down to the union meeting room in South Street. Then we telephone the office. If they have a job and then we go from the room on the job.

Q. Suppose the job is in Jersey City?

A. Well, it doesn't matter. You go to the job wherever it is, no matter where it is.

Q. Have you gone to many jobs from this meeting room that are located in Jersey?

A. Oh, yes.

Q. Tell me how you go.

A. Leave the place, go down the subway over to Carr Street.

Q. If you would answer the question so we could hear you it would help us.

A. I am doing the best I can.

Q. If the job was located in Jersey you went from the meeting room to Jersey at your own expense?

A. That's right.

Q. So you took the ferry or the Hudson Tubes or——

A. Yes.

The Referee: Did you do any shore work at all, Mr. Bergen?

A. No.

The Referee: Any questions?

Mr. Lisle: There was one question which Mr. Rosen asked that I am not quite sure of the answer on. I'd like to put it again and ask it again, if I may?

By Mr. Lisle:

Q. When there was a job in Jersey—was that your question?

Mr. Rosen: That's right.

Q. (Continuing.) How did you get to that job?

A. Which part of Jersey?

Q. Well, I don't know much about it.

[fol. 49] Mr. Van Emburg: Say 5th Street, Hoboken.

A. Go down to the Battery, you usually take the subway to the Battery, go up the Cortlandt Street, over the Hudson Street, then to the 5th Street pier.

By Mr. Rosen:

Q. Well, tell me, Mr. Bergen, where were you paid?

A. We were paid by the boss of the elevator. He used to pay us sometimes in the boat and sometimes the room.

Q. When you say the room, what do you mean?

A. I mean the union rooms.

Q. And that is located in New York City?

A. Yes.

Q. Is there any union room in Jersey that you frequented?

A. No.

Q. Let me ask you. Did you need any certificate or license in order to perform your work as a trimmer?

A. No.

Q. Mr. Van Emburg asked you if you handled any lines?

A. Yes, I have.

Q. What lines did you handle?

A. From what I understand at least one man of the trimming crew has to take a line from the elevator when she comes alongside of a ship.

Q. And then what do you do with that line?

A. We put it around to make the elevator fast—we put it around timberhead or something so that you can lead the elevator into the ship.

Q. When you started unloading the cargo ship into the big ship did you ever have to move the elevator?

A. Cargo ship?

Q. Don't forget we are not experienced in this kind of work—the grain boat.

A. The grain boat is moved.

[fol. 50] Q. Do you ever handle the lines?

A. No, only on the pipe on the ship.

Q. What's the pipe?

A. The pipe comes from the elevator to the ship and drops in the hold.

Q. As a matter of fact the only lines you handle are the lines that move the thing that runs the buckets?

A. Those are in the leg. I don't work on that side of the leg.

Mr. Van Emburg: It's dropped out on a yoke.

Q. All you handle are lines that moves that pipe, is that right?

A. Yes.

Q. And that's all you have to do in regard to lines?

A. Yes.

Mr. Van Emburg: Did you ever ship grain boats from one boat to another?

A. Yes. That's on the other side of the elevator—that has nothing to do with the men on the ship.

Mr. Van Emburg: But you do when the grain boats are around?

A. The boat gang, the ship gang—you take a boat man that hasn't been in a long while and send him on the ship and he is lost.

Mr. Van Emburg: All the trimmers do that work.

Mr. Lisle: May I ask Mr. Bergen a question. I think it would clear up the difficulty.

By Mr. Lisle:

Q. Do you work as a boat trimmer or ship trimmer?

A. Ship trimmer.

[fol. 51] Q. All the time?

A. Not all the time, not for twenty years ago.

Q. But during the period covered by—during the years 1938 and 1939 did you work as a ship trimmer or boat trimmer?

A. Ship trimmer.

By Mr. Rosen:

Q. Are the duties of a ship trimmer different from the duties of a boat trimmer?

A. Oh, yes, big difference.

Q. What's the difference?

A. Well, in the ship you got to go in no matter how dirty it is and shovel the grain—you got to go in and trim, load the ship, load the hold—put as much grain in the hold as possible.

By the Referee:

Q. What is the distinction between the ship trimmer and grain shoveler?

A. What is the difference between a ship trimmer and grain shoveler? Well, the grain shoveler is a man down in the boat. He handled what they call the steam shovel. He shovels the grain to the leg. Now you take a man on the ship, he takes the grain from the pipe and shovels it up to the bulkhead in the ship and the sides of the hold might be different sizes; of course, it makes harder work. At

times they run a lot of grain in the ship and the men certainly has a easy time of it.

Q. Did you ever perform any services as a grain shoveler?

A. Grain shoveler? Yes.

Q. On the elevator?

A. Yes.

Q. During 1938 and 1939?

A. No, not on the boats, on the ship—the ship side of the elevator.

Q. Was that during 1938 or 1939?

A. Yes.

[fol. 52] The Referee: Any more questions?

Mr. Rosen: I'd like to ask Mr. Van Emburg another question, Mr. Referee?

The Referee: All right.

FRANK VAN EMBURG, recalled.

By Mr. Rosen:

Q. Do the elevators have regular logs that they keep from day to day?

A. Yes.

Q. Wouldn't that log on the "Themis" and other boats show where that boat was on each day of the year?

A. It would.

Q. It would show what boats it was unloading and what boats it was loading?

A. What steamship it was loading and we have the records of the boats.

Q. I am just curious; that would give you an exact record, wouldn't it?

A. I have an exact record.

The Referee: Will you produce that record?

A. We can produce it, of course. What you want is what time it spent in one state or the other in a certain year.

COLLOQUY BETWEEN REFEREE AND COUNSEL

The Referee: That's correct.

Mr. Rosen: There are two things we'd like to have, Mr. Referee, that is for the year 1938 we'd like to determine

what part of the work of this claimant was performed in the State of New York—in other words where all or the greater part of his work was performed in 1938.

[fol. 53] The Referee: Not only for 1938 but up to June 3, 1939.

Mr. Van Emburg: 1938 to June 3, 1939?

The Referee: Thereafter the base of operations being from New York it wouldn't be much difference to the question at issue.

Mr. Van Emburg: Why June 3, 1939?

Mr. Rosen: As the Referee explained, the law changed.

The Referee: The law was amended effective June 3, and whether contributions are payable would depend on the base of operations rather than the greater portion of the work performed. So prior to June 3 it was solely on the proportion of work performed in New York State as compared to other states but after June 3 it is determined from the base of operations.

Mr. Van Emburg: Well, if these men are members of the crew of vessels they are exempt without regard to what state they work in.

The Referee: That's true.

Mr. Van Emburg: You contend that they are not?

The Referee: I haven't reached any conclusion.

Mr. Rosen: The Industrial Commissioner contends that whether or not they are members of the crew it is immaterial.

Mr. Lisle: Immaterial?

Mr. Rosen: Yes, if the work is performed on the navigable waters of the United States within the territorial limits of the State of New York.

[fol. 54] Mr. Lisle: Even though members of the crew?

Mr. Rosen: I say that is the contention of the Industrial Commissioner.

Mr. Lisle: May I have Mr. Van Emburg for a minute?

The Referee: Of course. The referee has residuary powers and may upset the rulings of the Industrial Commissioner.

Mr. Rosen: That was the ruling of the Industrial Commissioner.

Mr. Lisle: I think I have some material here that would help the referee at arriving at a decision.

The Referee: Do you want to submit anything on record?

Mr. Lisle: Yes, I would very much.

By Mr. Lisle:

Q. I show you a letter from the Treasury Department, Washington, January 30, 1937, addressed to the International Elevating Company and signed by D. S. Bliss, Deputy Commissioner. Was this letter received by you in response to various requests for a ruling as to the status of your employees on the elevators?

A. Yes.

Q. Would you tell the Referee the previous background of this letter? This letter states that certain rulings described have been reconsidered and as a result of reconsideration are hereby revoked. Can you tell the Referee to what rulings that refers? Do you remember?

A. You mean to read this letter?

Q. No.

The Referee: Off the record.

[fol. 55] (A brief discussion ensued off the record.)

Mr. Rosen: May I suggest the letters and rulings be submitted in evidence so they can speak for themselves?

Mr. Lisle: I have a copy.

Mr. Rosen: I'd rather have Mr. Eisen read them into the record.

Mr. Lisle: Might I suggest that the Referee read it in in view of the fact that it is an original letter?

The Referee: A letter dated January 14, 1937 on the stationery of the Treasury Department, Washington, addressed to International Elevating Company, 8 Broadway, New York, New York. Attention Mr. E. C. Burgess, Jr., Treasurer. "Sirs:—"

Mr. Rosen: It seems to me that this isn't evidence that you can't take the copy for consideration without——

The Referee: If Mr. Rosen doesn't object to it?

Mr. Rosen: I haven't any objection if I am assured that it is a copy of it but I refuse unless that is an exact copy.

Mr. Lisle: If it had been prepared in my office I'd be able to say it is an exact copy.

Mr. Van Emburg: Can't we check it here?

The Referee: A comparison of the copy with the original indicates that it is an exact copy. This copy is received for the claims folder for the Employer's Exhibit 1 and made a part of the record. Anything else you want to put on record?

Mr. Lisle: Yes. There is another matter that I think will be helpful to the Referee.

[fol. 56] By Mr. Lisle:

Q. I have here, Mr. Van Emburg, a copy of a letter to the International Longshoremen's Association, attention Mr. Joseph P. Ryan. Will you tell me, will you tell the Referee rather, what were the circumstances of your obtaining that letter, that copy?

A. We requested Joseph P. Ryan to communicate with Washington and find out the status of these trimmers. This is the copy of the reply received.

The Referee: No objection to receiving this?

Mr. Rosen: Yes, I have objection. This is a copy. I don't know where the original is.

A. That is the copy we got from Ryan. Mr. Ryan has the original.

COLLOQUY BETWEEN REFEREE AND COUNSEL

Mr. Rosen: I have no objection to it.

The Referee: Will you read the contents and see whether you want to object?

Mr. Rosen: That is addressed to the union and I don't see what materiality it has.

The Referee: Suppose they submit the copy for what it's worth. Letter dated May 14, 1937, addressed to the International Longshoremen's Association, 265 West 14 Street, alleged to be a copy of the original which is in the possession of the Association, is received for the claims folder as the Employer's Exhibit 2 and made part of the record. Anything else that you want to submit?

Mr. Lisle: If the Referee would find it helpful we also [fol. 57] have a letter here from the Department of Labor in the State of New York, having to do with the same question. It is from Harry K. Hurwitz and dated April 1, 1936. Do you wish to see it?

(Referee hands letter to Mr. Rosen for inspection.)

Mr. Rosen: Well, your Honor, seeing that this letter came from the Controller of the Division of Placement and Unemployment Insurance I can't very well object to it. However, this is an answer to certain letters. I would sug-

gest that this letter be not regarded complete until we have the copies of the letters to which it is a reply. Have you those copies available, counselor?

Mr. Lisle: The company has I believe.

Mr. Van Emburg: Our letters January 9 and February 3.

Mr. Lisle: Of course, your department will have the original of those letters. All we can give are the copies of those or copies of those copies if that would be sufficient.

Mr. Rosen: That would be sufficient, yes.

The Referee: Of course, you understand that any administrative ruling is not binding on the claimant being ex parte. Since there is no objection to the receipt of this letter in question I will receive it for the claims folder marked Employer's Exhibit——

Mr. Lisle: We can't submit that. We haven't a copy of it.

The Referee: I will allow you to read this letter into the record.

[fol. 58] Mr. Rosen: Incidentally, your Honor, the rulings of the Department of Internal Revenue are not binding on the Division of Placement and Unemployment Insurance in the State of New York. I haven't objected to the admission in evidence of those other letters simply to be considered what they are worth. We do not concede that they are binding.

The Referee: That's exactly how I am accepting that.

Mr. Lisle: I asked the stenographer to copy it.

The Referee: Copy that, please.

EMPLOYER'S EXHIBIT 3

(The following was copied by the reporter):

"State of New York, Department of Labor, Division of Unemployment Insurance, Albany, New York, N. Y., April 1, 1936. International Elevating Company, 2 Broadway, New York, N. Y., Attention Mr. F. N. Van Emburg, Assistant Treasurer. Gentlemen: I wish to reply to your letters of January 9 and February 3.

"It is desired that you submit to us certain definite information with respect to the employment of all of your employees showing the time worked and wages earned. Such records of payrolls as you now keep would be sufficient for our purposes provided that they give identical information as required in the instructions we sent you on

December 3. In the case of piece workers where you cannot indicate the actual number of hours worked merely indicate in the column entitled hours worked, piece workers.

[fol. 59] "Only employees who perform all or the greater part of their work within New York State are covered by the New York Unemployment Insurance Law regardless of their place of residence. Employees who perform a minimum or part of their work within New York State are not covered.

"However, the question of our jurisdiction of employees working on vessels operating in the navigable water of the United States may be involved. Employees thus employed are not covered by the law. Our jurisdiction, however, will extend to such employees as longshoremen, harbor workers and those whose work is partly in maritime water and partly on shore.

"The form which you submitted is not required by this division at the present time. However, if you wish to use this form in your record keeping there is no objection. Yours very truly, (Signed) Harry G. Hurwitz."

Mr. Lisle: May I make that short statement that I wanted to make at the beginning, Mr. Referee?

The Referee: All right, you may.

Mr. Lisle: I will try to make it not in the nature of an argument but in the nature of a statement of background so that it would be more helpful to you. When the Unemployment Insurance Law went into effect this employer realized that there was a serious question as to the status of its employees on the elevators and that includes the trimmers. For some time, because of the difficulty of the question, they paid the tax and made the necessary returns. [fol. 60] Isn't that so, Mr. Van Emburg?

The Referee: Is that to the New York State Unemployment Insurance?

Mr. Lisle: You paid to New York?

Mr. Van Emburg: We paid old age. I don't know whether we paid New York. I wouldn't swear to it.

Mr. Lisle: Will you strike that out then where I said that they paid the unemployment tax before. Social security taxes were paid to the federal government under Title VIII certainly. However, an effort was made to get rulings as to the status of these employees and certain of these rul-

ings which are unequivocal in character have been referred to the Referee. They took the form of letters from the Deputy Commissioner of Internal Revenue and as far as the ruling of the Division of Unemployment Insurance, although it is not entirely clear the statement is made that the jurisdiction of the Industrial Commissioner merely extends to such employees as longshoremen, harbor workers and those whose work is partly in maritime *workers* and partly on shore. Now in view of the fact that the individuals employed on the elevators are employed entirely on the navigable waters of the United States and never on shore the company assumed that they were within the exemption of maritime employees, that their employees were exempt as maritime employees. The question raised is one which has already been before the Unemployment Insurance Appeal Board in a very similar case. The Unemployment Insurance Appeal Board held——

[fol. 61] Mr. Rosen: What case is that?

Mr. Lisle: I'll give you that case in just a moment. They held that an employee on a steam derrick engaged in unloading and transporting machinery and heavy objects in a shipyard was engaged in maritime employment and therefore not subject to the Unemployment Insurance Law.

The Referee: What is the number of the case?

Mr. Lisle: That was Case No. 607-39, 537-34-39R. The name of the claimant was Carl J. Nilsen.

The Referee: Anything else you want to say?

Mr. Lisle: Is there anything you can think of Mr. Van Emburg?

Mr. Rosen: Mr. Referee, I want to refer to one statement made by Mr. Lisle. If this employer relied on the letter from this division dated April 1, 1936, I would say his reliance on that was premature in view of a paragraph contained in that letter which said, "Our jurisdiction, however, will extend to such employees as longshoremen, harbor workers, etc."

Mr. Lisle: Read the et cetera, Mr. Rosen, please.

Mr. Rosen: "And those whose work is partly in maritime waters and partly on shore."

Mr. Lisle: Yes.

Mr. Van Emburg: These men are not longshoremen.

Mr. Rosen: Are they harbor workers?

[fol. 62] Mr. Van Emburg: They are a crew of the elevator, part of the crew which the elevator cannot operate without.

The Referee: This letter also states that it is desired that you submit to us certain definite information with respect to the employment of all employees. Has that information been submitted?

Mr. Lisle: Mr. Van Emburg——

The Referee: This letter dated April 1, which is marked for identification as the Employer's Exhibit 3, says it is desired that you submit to us certain definite information with respect to the employment of all your employees showing the time worked and the wages earned. Was this information ever submitted to the Division of Unemployment Insurance?

Mr. Van Emburg: It would have to be submitted in the report, wouldn't it?

The Referee: You don't know whether you followed that up in any way?

Mr. Van Emburg: I can't say off hand.

Mr. Lisle: I might say——

The Referee: Evidently the ruling there is inconclusive. They expected certain information from you.

Mr. Lisle: If the Referee please, the company made very, very assiduous effort to find out what the status of its employees in the elevators was under the federal law and having obtained a ruling that these employees were maritime employees within Title IX, Section 907, Section 3c it was assumed on the basis of a ruling of the Attorney General of the State of New York that the position of New York would follow that of the federal government and it was [fol. 63] counsel's advice at the time in view of these rulings it would be entirely proper to assume that these men were exempt.

The Referee: Is this said to——

Mr. Lisle: This is an explanation.

The Referee: —show extenuating circumstances? You recognize that such a letter cannot be conclusive in itself.

Mr. Lisle: Oh, absolutely but I don't think it is quite proper to say it is to extenuate our position because I never conceded that there is anything that needs to be extenuated.

The Referee: We won't go into that matter just now. Is there anything else?

JOSEPH BERGEN, recalled.

By Mr. Rosen:

Q. When you first get on the elevator, if that elevator is moored to the dock and it then starts moving over to the grain ship, do you have any work on that elevator?

A. No.

Q. What do you do?

A. Just trim grain.

Q. But on the elevator before it goes over and ties up?

A. When the elevator goes alongside the ship?

Q. Before that?

A. Nothing.

Q. Nothing at all?

A. Nothing.

Q. That is all.

The Referee: Any further questions?

Mr. Lisle: I'd like to ask Mr. Bergen some questions.

By Mr. Lisle:

Q. Would your answer to that question be true for all the [fol. 64] trimmers? Aren't there some trimmers that travel with the elevator?

A. At their own expense.

Q. I see. But once you start to work, when you start to work in the morning, you go to where the elevator—to where the job is?

A. Yes.

Q. Suppose you finish that job—suppose you finish that job at eleven o'clock in the morning and there is another job—say your first job was at a pier in the North River and your second job is in Jersey, would you go with the elevator?

A. You're expected to go on shore and go over by boat but instead of that the men stay on and go across with the elevator.

Q. But you do travel with the elevator?

A. Yes, sure. It is quicker. You have to have the grain on by a certain time and it is quicker for us to get over there. It makes a lot of trouble and the man is pretty well tired out and when he is over there he isn't fit to work.

By Mr. Rosen:

Q. You said at one's own expense a moment ago. What do you mean?

A. When he goes from the room to the job it is all his own expense.

Q. Assuming that one job is finished at eleven o'clock in the morning and you stay on the elevator and you are conveyed to another job that job starts at three o'clock in the afternoon, are you paid for the hours between eleven and three?

A. No, only while grain is being going from the pipe into the ship.

Q. So for those three or four hours between jobs that you remain on the elevator you are a passenger on the vessel?

A. Yes.

Mr. Van Emburg: I don't think so, Mr. Rosen.

[fol. 65] By the Referee:

Q. The rate of pay is determined solely by the amount of bushels that are handled?

A. Yes.

Q. And not by any other work?

A. I will give you some dope on it.

Q. What is your answer to that question?

A. Yes, that's right.

By Mr. Rosen:

Q. When you travel, Mr. Bergen, from one job to another on the grain elevator, do you pay for your passage?

A. It depends on how far it is.

Q. When you travel on the grain elevator do you pay for your passage?

A. No.

Mr. Lisle: In other words, if you have a job at the foot of Manhattan and you go over to Jersey some place on the elevator you travel free?

A. Yes. You're right.

Mr. Van Emburg: You are not a passenger?

A. Not a passenger.

Mr. Van Emburg: Member of the crew.

Q. Do you have any work to perform while you are traveling?

A. No.

Q. Do you perform any work while you are traveling?

A. No.

Mr. Van Emburg: He is a deckhand.

Mr. Rosen: I am interested in this particular case, Mr. Van Emburg.

The Referee: Am I to understand that you will submit the proportion of the work in New York as compared with that of New Jersey with respect to the claimant?

[fol. 66] Mr. Van Emburg: With respect to Mr. Bergen for 1938 up to June 3, 1939—we can dig it out I suppose. It is quite a sweet job though.

The Referee: What form shall we submit it by, affidavit form?

Mr. Rosen: Whatever form is acceptable to you, your Honor. The only point is this. Up to June 3, 1939 if they can satisfy you that all or the greater portion of this man's work was performed outside the State of New York he is not entitled to benefits. Subsequent to June 3, 1939 we are interested more in the exact location of each day's work.

The Referee: Now, shall we adjourn this case for the purpose of securing that additional information or is it satisfactory to you that the employer submits it in affidavit form?

Mr. Rosen: It doesn't matter to me. I am sure that if it is submitted in affidavit form and taken from the records that that would be an exact transcript if the employer says so. However, we have the claimant here.

The Referee: We'll inquire from the claimant if he objects to the procedure?

By the Referee:

Q. Is it satisfactory to you to accept the affidavit of the employer with respect to the performance of the work?

A. Providing it is a true application I will agree to it. I say if it is a true application I will agree to it.

Q. You either accept the affidavit as true——

A. I mean if it is a true one I will accept it.

[fol. 67] Q. Do you wish to examine it?

A. I certainly do.

Mr. Lisle: Might I suggest that we send—prepare it in affidavit form and send a copy to Mr. Bergen and give him a few days to make any objections and then if it is all right we will submit it in affidavit form. It will be much more useful than by having it in questions and answers.

Q. Is that agreeable to you?
A. That is agreeable.

The Referee: You will submit an affidavit for the record and serve a copy on the claimant and if there are no objections within ten days of the date of its receipt and the date that it is filed with this department I will proceed to close the case and render decision. Is that satisfactory to you?
Mr. Rosen: It is satisfactory to me.
The Referee: Is that satisfactory to all parties here?
Mr. Lisle: Yes.
Mr. Van Emburg: Yes.
Mr. Bergen: Yes.
The Referee: Case adjourned awaiting receipt of the affidavit.

Certified to be a true and correct copy of the transcript of minutes.

Libby Goldberg, Hearing Stenographer.

Transcribed 7/1/40.

[fol. 68] BEFORE DIVISION OF PLACEMENT AND UNEMPLOYMENT INSURANCE

[Title omitted]

AFFIDAVIT OF F. N. VAN EMBURG

STATE OF NEW YORK,
County of New York, ss:

F. N. Van Emburg, being duly sworn, deposes and says:

He is the Assistant Treasurer of International Elevating Company, the employer of the above claimant, and is familiar with the facts of the employment of said claimant.

This affidavit is made for the purpose of supplying data to the Referee of the Industrial Commissioner in connection with the claim of Joseph Bergen aforesaid to unemployment insurance benefits under Article 18 of the Labor Law of this State.

The earnings of Joseph Bergen while he was in the employ of International Elevating Company for the whole of the year 1938 and for the period from January 1 to June 3, [fol. 69] 1939, are allocated to the States of New York and New Jersey as follows:

	New York	New Jersey
1938	$636.88	$253.56
1939	94.59	57.77

Earnings have been allocated as above set forth to the State adjacent to which the services of the claimant were performed. All services were performed on vessels on the navigable waters of the United States, and no services were performed ashore either in the State of New York or New Jersey

Deponent makes the above statement of earnings and the above allocation on the basis of an examination of the records of the employer, International Elevating Company.

The elevators of International Elevating Compan[illegible] are all registered at the New York Custom House, as is the case with all vessels plying waters of New York Harbor and tributary streams. This being the case, the home port of the elevators, your deponent is informed, is New York City; however, the hailing port of the elevators of International Elevating Company is Jersey City, New Jersey.

F. N. Van Emburg.

(Sworn to June 18, 1940.)

[fol. 70] EMPLOYER'S EXHIBIT 1

Copy

Treasury Department

Washington

MT:SS:R Jan. 14, 1937.

International Elevating Company, 8 Broadway, New York, N. Y.

Attention Mr. C. E. Burgess, Jr., Treasurer

SIRS:

Your attention is directed to Bureau letters dated November 25, 1936, and December 5, 1936, which contain rulings to the effect that services performed by individuals on floating

grain elevators are not rendered as an officer or member of a crew serving on board a vessel in connection with its operation and welfare and do not come within the excepted class as set forth in Sections 907(c)(3) and 811(b)(5) of the Social Security Act.

You are advised that such rulings contained in the above mentioned Bureau letters have been reconsidered and as a result of reconsideration such rulings are hereby revoked.

Accordingly, with respect to Title IX of the Act, services performed as an officer or member of the crew of such vessels on the navigable waters of the United States are excepted and with respect to Title VIII of the Act services performed as an officer or member of the crew of such vessels which are documented under the laws of the United States or any foreign country are excepted.

Respectfully, D. S. Bliss, Deputy Commissioner.

cc Collector, Customhouse, New York, New York.

[fol. 71] EMPLOYER'S EXHIBIT 2

Treasury Department

Washington

May 14, 1937.

International Longshoremen's Association, 265 West 14th St., 19th Floor, New York, N. Y.

Attention: Mr. Joseph P. Ryan, International President

SIRS:

Reference is made to your letter dated March 5, 1937, relative to the provisions of Section 811(b)(5) of the Social Security Act.

It is stated that certain individuals employed by the International Elevating Company are "grain trimmers" employed by the owner of floating grain elevators and permanently attached to such elevators when working. Their work is performed entirely on navigable waters and in connection with the elevating of grain by such floating elevators in and about the port of New York.

A ruling is requested as to whether such "grain trimmers" are considered as "officers or members of the crew"

within the exception contained in Section 811(b)(5) of the Social Security Act.

You are advised that it is the opinion of this office that services performed by "grain trimmers" on documented floating grain elevators are excepted from "Employment" under Section 811(b)(5) of the Act. Accordingly, no liability for tax under Title VIII of the Act is incurred with respect to such service.

Respectfully, D. S. Bliss, Deputy Commissioner.

cc Collector, Customhouse, New York, New York.

[fol. 72] AFFIDAVIT OF NO OTHER OPINION

STATE OF NEW YORK,
County of Kings, ss:

Francis J. Gilbride, Jr., being duly sworn, deposes and says:

I am an Attorney and Counselor-at-law associated with Cullen & Dykman, Attorneys for Appellant herein, that no other opinion except the decision of the Unemployment Insurance Appeal Board, dated December 6, 1940, and the decision of the Unemployment Insurance Referee, dated July 9, 1940, printed herein at pages 5 to 12 and 15 to 19, respectively, was rendered.

Francis J. Gilbride, Jr.

Sworn to before me this 7th day of August, 1941.
Fred L. Space, Notary Public, Richmond County.
Certificate filed in Kings County.

[fols. 73-74] STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing papers are true and correct copies of the originals on file in the office of the State Department of Labor and of the whole thereof, and constitute and include the notice of appeal to the Appellate Division, and all of the papers, reports, records, documents and evidence which were before and were acted upon by the Division of Placement and Unemployment Insurance, Un-

employment Insurance Appeal Board of the Department of Labor of the State of New York upon the consideration and determination of the claim of Joseph Bergen for compensation under the Unemployment Insurance Law, against International Elevating Company, and the certification thereof by the secretary of the State Department of Labor is hereby waived.

Dated, New York, August 8, 1941.

Cullen & Dykman, Attorneys for Appellant. Hon. John J. Bennett, Jr., Attorney General, Attorney for Respondent.

[fol. 75] In Supreme Court of New York, Appellate Division

Notice of Appeal as of Right to Court of Appeals—January 23, 1942

[Title omitted]

Sirs:

Please take notice that Frieda S. Miller, as Industrial Commissioner, hereby appeals to the Court of Appeals of the State of New York from an order of the Appellate Division of the Supreme Court of the State of New York for the Third Judicial Department, made and entered on the 10th day of December, 1941, reversing the decision of the Unemployment Insurance Appeal Board of the New York State Department of Labor, dated December 6, 1940, and [fol. 76] that the said Appellant hereby appeals from the whole and from each and every part of the said order.

Dated: Albany, New York, January 23, 1942.

Yours, etc., John J. Bennett, Jr., Attorney General, Attorney for Appellant, The Capitol, Albany, New York; by W. Gerard Ryan, Assistant Attorney General, 112 State Street, Albany, New York.

To: Cullen & Dykman, Esqs., Attorneys for Employer-Respondent, 177 Montague Street, Brooklyn, New York; Joseph Bergen, Claimant, 7314 Fifth Avenue, Brooklyn, New York; Unemployment Insurance Appeal Board, 342 Madison Avenue, New York, New York; Clerk, Appellate Division, Court House, Albany, New York.

[fol. 77] In Supreme Court of New York, Appellate Division

Order Appealed From—September 15, 1941

[Title omitted]

The Appellant above named, having appealed to this Court from the decision of the Unemployment Insurance Appeal Board, Department of Labor, made December 6, 1940, in favor of the above named Claimant, and said appeal having come on to be heard in this Court, and due deliberation having been had thereon,

Now, on the motion of Cullen & Dykman, attorneys for International Elevating Company, the Employer above named,

[fol. 78] It is unanimously Ordered that the decision appealed from be and the same is hereby reversed with costs to the Employer.

John S. Herrick, Clerk. (Seal.)

A true copy. John S. Herrick. Ent. 12/10/41, Clerk.

In Supreme Court of New York, Appellate Division

Decision of Appellate Division—November 12, 1941

In the Matter of the Claim for Benefits under Article 18 of the Labor Law Made by Joseph Bergen, Claimant,

v.

International Elevating Company, Appellant,

Frieda S. Miller, as Industrial Commissioner, Respondent

Decision of the Appeal Board reversed, with costs.
Opinion by Schenck, J.
Hill, *P. J.*, Crapser, Bliss and Heffernan, *JJ.*, concur.

[fol. 79] In Supreme Court of New York, Appellate Division

Opinion for Reversal

In the Matter of The Claim for Benefits under Article 18 of the Labor Law, Made by Joseph Bergen, Claimant,

International Elevating Company, Employer, Appellant,

Frieda S. Miller, Industrial Commissioner, Respondent

Argued September Term, 1941.
Decided , 1941.

Hon James P. Hill, Presiding Justice.
Hon. John C. Crapser, Hon. F. Walter Bliss, Hon. Christopher J. Heffernan, Hon. Gilbert V. Schenck, Associate Justices.

Appeal by Employer-Appellant, from a decision of the Unemployment Insurance Appeal Board affirming the decision of the Unemployment Insurance Referee holding that claimant worked in employment subject to the Unemployment Insurance Law.

Cullen & Dykman, Attorneys for Appellant, No. 177 Montague Street, Brooklyn, N. Y. (Arthur E. Goddard, Harry G. Hill and Robert B. Lisle, of Counsel).

[fol. 80] John J. Bennett, Jr., Attorney General, Attorney for Respondent, Albany, N. Y. (Henry Epstein, Solicitor General; W. Gerard Ryan and Francis R. Curran, of Counsel).

Schenck, j.:

This is an appeal by International Elevating Company, an employer, from a decision of the Unemployment Insurance Appeal Board which affirmed a decision of a Referee holding the claimant herein to be entitled to benefits under the Unemployment Insurance Law (Labor Law, art. 18, §§ 500-539) of New York State. The controversy is in regard to the question of whether the claimant was or was not engaged in the maritime field on navigable waters of the United States in such manner as to be outside the scope of the power of the State of New York in this respect.

The claimant was employed as a "grain trimmer" in connection with the operation of floating grain elevators owned and operated by the employer herein. The elevators were used in the business of loading and unloading grain to and from vessels in the harbor of New York. In brief, the business of the employer was to transfer grain from one vessel to another as, for example, to transfer a cargo of grain from an ocean going ship to a barge for further transportation. The elevators used in the business are self-propelling. They are made fast to the steamship from which or to which the transfer is to be made while the ship is at the pier. Thereupon the vessel to which or from which the grain is to be transferred comes alongside the elevator and the transfer is made via the elevator.

[fol. 81] Trimmers, such as claimant, work not only on the elevator itself but also in the holds of the discharging or receiving vessels. They operate steam shovels which push the grain to the elevator "leg," see to the "trimming" of the grain in the two holds, handle ship lines and perform other similar duties. They never work on shore. Some of the piers at which the elevators are used are located in New York. Others are in New Jersey. Claimant has worked at piers in both states during the period involved herein.

Under the foregoing facts, it seems clear to me that this claimant has been engaged in interstate commerce on the navigable waters of the United States. He is accordingly not subject to the jurisdiction of either New York State or New Jersey (although under the decisions of the Board he might be subject to both), but rather is subject solely, in respect to the matter in controversy here, to the admiralty and maritime jurisdiction of the United States.

This jurisdiction is pursuant to section 2 of article III of the Constitution of the United States. It cannot be delegated to the several States. The grant of admiralty jurisdiction to the federal government was: "* * * to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation * * *." (*Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149.) This purpose would be violated if the Board's decision herein were upheld.

The New York Workmen's Compensation Law has been held inapplicable to carpenters, rockloaders, boiler-workers,

and watchmen on various types of vessels, engaged in oper-
[fol. 82] ations similar to those here, on the ground that they were engaged in maritime employment. (See *Matter of Doey v. Howland Co.*, 224 N. Y. 30; *Matter of Keator v. Rock Plaster Manufacturing Co., Id.* 540; *Norman v. Merritt & Chapman Derrick & Wrecking Co.*, 200 App. Div. 360.)

There is no basic distinction between the Unemployment Insurance Law and the Workmen's Compensation Law so far as fundamental jurisdiction is concerned. It follows that the employer herein cannot be subjected to the New York State Unemployment Insurance Law. The decision of the Board must, accordingly, be reversed.

It is unnecessary to go into the Federal and State statutes that might otherwise be involved. Suffice to say that Title IX of the former Social Security Act excepts from the term employment, "service performed as an officer or member of the crew of a vessel on the navigable waters of the United States." (Internal Revenue Code [U. S. Code, tit. 26], § 1607, subd. [c], ¶[4].) This is superfluous in view of the above mentioned constitutional provision upon the point but is referred to as being an additional ground for reversal here.

Decision of Unemployment Insurance Appeal Board should be reversed, with costs.

[fol. 83] In Supreme Court of New York, Appellate Division

Affidavit of No Further Opinion

State of New York,
County of Albany, ss:

W. Gerard Ryan, being duly sworn, deposes and says that he is an Assistant Attorney General in the office of John J. Bennett, Jr., Attorney General of the State of New York, attorney for appellant herein, and that no opinion was handed down by the Appellate Division in deciding this appeal, except the opinion for reversal by Schenck, J. as hereinbefore printed.

W. Gerard Ryan.

Sworn to before me this — day of April, 1942.

Harold F. Lee, Notary Public, Albany County.

In Supreme Court of New York, Appellate Division

Stipulation Waiving Certification to the Court of Appeals

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the papers on appeal to the Appellate Division, Third Department, the order of the Appellate Division appealed from, the opinion for reversal of the Appellate Division, and the notice of appeal as of right to the Court of Appeals, all of which are now on file in the office of the Department of Labor and in the office of the Clerk [fol. 84] of the Appellate Division, Third Department, Albany, New York, and that certification thereof is hereby waived.

Dated Albany, New York, April —, 1942.

John J. Bennett, Jr., Attorney General, Attorney for Appellant, by W. Gerard Ryan, Assistant Attorney General. Cullen & Dykman, Attorneys for Employer-Respondent.

[fol. 85] In Court of Appeals of New York

Remittitur—October 16, 1942

State of New York, ss:

Pleas in the Court of Appeals, Held at Court of Appeals Hall, in the City of Albany, on the 15th Day of October, in the Year of Our Lord One Thousand Nine Hundred and Forty-two, Before the Judges of Said Court

Witness, the Hon. Irving Lehman, Chief Judge, Presiding

John Ludden, Clerk

Remittitur—October 16, 1942

In the Matter of the Claim for Benefits under Article 18 of the Labor Law, Made by Joseph Bergen

Be it Remembered, That on the 12th day of May in the year of our Lord one thousand nine hundred and forty-two Frieda S. Miller, as Industrial Commissioner the appellant

in this cause, came hereunto the Court of Appeals, by John J. Bennett, Jr., Attorney General, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And International Elevating Company the respondent in said cause, afterwards appeared in said Court of Appeals by Cullen & Dykman, its attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Henry Epstein, of counsel for the appellant, and by Mr. Jules Haberman, of counsel for the respondent, and after due deliberation had thereon, did [fol. 86] order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and determination of Unemployment Insurance Appeal Board affirmed with costs in this court and in the Appellate Division.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court there to be proceeded upon according to law.

Therefore, it is considered that the said order of Appellate Division be reversed and determination of Unemployment Insurance Appeal Board affirmed with costs in this court and in the Appellate Division, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Third Judicial Department before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, October 16, 1942

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 87] IN THE COURT OF APPEALS OF NEW YORK

OPINION—October 15, 1942

In the Matter of the Claim of MIKE CASSARETAKIS

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, Appellant; Standard Dredging Corporation, Respondent, and Five Other Cases

Appeals from two orders of the Appellate Division of the Supreme Court in the third judicial department, entered December 1, 1941 and December 10, 1941, respectively, which reversed decisions of the Unemployment Insurance Appeal Board determining that the claimants worked in employments subject to the unemployment insurance law (Labor Law, art. 18 [Cons. Laws, ch. 31]) and were entitled to be credited with their earnings in such employments as a basis for unemployment insurance benefits.

Appeal, by permission, from four orders of the Appellate Division of the Supreme Court in the third judicial department, entered November 19, 1941, each of which unanimously affirmed a decision of the Unemployment Insurance Appeal Board determining that the claimant in each such proceeding did not work in an employment subject to the unemployment insurance law (Labor Law, art. 18 [Cons. Laws, ch. 31]) and was not entitled to be credited with his earnings in such employment as a basis for unemployment insurance benefits.

John J. Bennett, Jr., Attorney-General (*Henry Epstein, W. Gerard Ryan* and *Francis R. Curran* of counsel), for appellant.

H. Maurice Fridlund, Jules Haberman, Frank C. Mason, Edward K. Bachman, James Ragan Roberts, Arthur E. Goddard, Robert B. Lisle and *Edward L. P. O'Connor* for respondents.

FINCH, J.:

These six appeals present the question whether the New York unemployment insurance law (Labor Law, art. 18; Cons. Laws. ch. 31), imposing a pay-roll tax upon all employers of four or more employees, without discrimination and without exception here material, is applicable to marine employments.

In four of the above cases the Unemployment Insurance Appeal Board has found that the claimants had been employed as members of the crews of vessels on the navigable waters of the United States and for that reason the Board held that they were not covered by the unemployment insurance law. In the two remaining cases (*Matter of Cassaretakis* and *Matter of Bergen*) the Board has found that the claimants, although engaged in marine employments, had not been employed as members of the crews of vessels on the navigable waters of the United States, and on this basis held that they were covered by the statute in question.

Upon appeal to the Appellate Division, the decision of the Board in the four cases first mentioned above was sustained. In the other two cases, however, the determinations were reversed upon the ground that, by reason of the admiralty [fol. 88] clause of the Federal Constitution, the unemployment insurance statute may not be held applicable to maritime employments.

The definition of employment contained in the New York Act (Labor Law, § 502) is admittedly sufficiently broad to cover all maritime employments, including service as an officer or member of a crew of a vessel upon navigable waters of the United States, provided the whole or greater part of such employment is performed within this State. The Federal statute (U. S. Code, tit. 26, § 1607, subd. c), on the other hand, specifically excludes from the tax levied thereunder services rendered as officer or member of a crew of a vessel upon the navigable waters of the United States.

Whether or not an individual is a member of a crew of a vessel on the navigable waters of the United States presents primarily a question of fact which turns generally on whether the individual serves the ship in her navigation. (*South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 259.) In consequence the determination of the Appeal Board, if sustained by substantial evidence, is conclusive upon the courts. (Labor Law, art. 18, § 534; *Matter of Morton*, 284 N. Y. 167.) Upon this record there is substantial evidence to sustain the findings of fact in this regard of the Appeal Board. As to the four claimants who were found to be members of the crews of vessels, Sheredos was a cook on a self-propelled vessel carrying petroleum between points in New York and New Jersey; Schein was an attendant on a speed boat which transported passengers from a New York city pier to the World's Fair; Knowlson

was second engineer on a tugboat; Smith was a fireman on a lighter. All were plainly members of crews of vessels. On the other hand, Cassaretakis was assistant cook on board a dredge which was employed in a land filling operation in connection with the construction of a public highway. Bergen was a grain-trimmer on a floating grain elevator, his work being in connection with transfer of grain from one barge to another for purposes of further transportation. The employment of these two latter claimants, therefore, may be deemed incidental to construction and stevedoring operations, respectively, rather than to navigation. In consequence, Cassaretakis and Bergen, although concededly engaged in general maritime employment, were not members of crews of vessels on the navigable waters of the United States. These two claimants have, moreover, been found to be engaged in employment the whole or greater part of which was transacted within this State.

Two questions of law are raised, (1) whether there is constitutional objection to the application of the statute in question to maritime employments generally, and (2) if there is no such constitutional objection, whether the Congress preempted that part of the field relating to navigation by enacting a statutory prohibition against coverage by the State law, of officers and members of the crew of a vessel on the navigable waters of the United States.

In order to induce the several States to enact unemployment insurance statutes, the Federal government, by the [fol. 89] Federal Unemployment Tax Act (Internal Revenue Code, U. S. Code, tit. 26, §§ 1600, 1601) levied a pay-roll tax upon employers, with certain exceptions, but allowed a credit up to ninety per cent of the Federal pay-roll tax to employers on account of contributions paid for State unemployment insurance. On its part the State of New York has levied a pay-roll tax upon employers measured by a percentage of the pay-roll and assessed upon all employers generally without regard to the nature of employment, with certain exceptions not here material (Labor Law, art. 18, §§ 515, 516). Neither the National nor the State government contributes anything to the fund. The moneys collected by means of this tax are used for the relief of the unemployed, concededly an object within the powers of the State. (*Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495.)

This tax is an excise based upon the exercise of the privilege of employing individuals. (*Steward Machine Co.* v. *Davis*, 301 U. S. 548, 578-583; *Carmichael* v. *Southern Coal & Coke Co., supra; Patton* v. *Brady*, 184 U. S. 608.) The obligations of the employer under this law are not to his employees but to the State. Likewise, claimants of benefits assert their rights against the State and not against the employer. The employer's duty to pay contributions and the employee's right to receive benefits are independent of each other. The employer must continue to pay the tax although none of his employees ever becomes entitled to benefits through lack of employment; the employee has a right to receive benefits upon becoming unemployed although his employer has failed to contribute.

A mere statement of this State law demonstrates that it does not modify or attempt to modify, alter or supplement the rights and liabilities of the parties to any maritime contract, nor does it touch remedies enforceable in admiralty. This tax exists independently of the employment out of which it arises. The measure of the tax by the amount of wages paid does not make the tax less independent of the occupation. Conceding that these claimants performed services under a maritime contract of employment, nothing in the challenged statute in any way changes, modifies or affects the reciprocal rights and duties of the employer and employee arising out of the maritime contracts or the remedies enforceable in admiralty. There is a fundamental distinction between statutes which interfere with the rights and obligations of the parties to a maritime contract, as between themselves, and a statute which effects no such interference.

The power to levy such an excise tax and to use the funds thus raised for local purposes is a sovereign power reserved to the States, of which they were not deprived by the Constitution of the United States. In *Carmichael* v. *Southern Coal & Coke Co.*, Mr. Justice Stone (now chief justice) said: "Taxes • • • may likewise be laid on the exercise of personal rights and privileges. As has been pointed out by the opinion in the *Chas. C. Steward Machine Co.* case, such levies, including taxes on the exercise of the right to employ or to be employed, were known in England and the [fol. 90] Colonies before the adoption of the Constitution, and must be taken to be embraced within the wide range of choice of subjects of taxation, which was an attribute of

the sovereign power of the States at the time of the adoption of the Constitution, and which was reserved to them by that instrument." (p. 508.)

It is contended, however, that the State may not thus exercise its reserved powers of taxation because it involves a conflict with paramount powers vested in the Federal government in two respects; *first*, the State law is alleged to interfere with and burden maritime commerce in its national and international aspects as to which Congress alone has power to legislate; *second*, the State law is also alleged to contravene the essential purposes of and to work prejudice to characteristic features of the maritime law, and to interfere with its proper harmony and uniformity in its interstate and international relations.

The paramount power of Congress to legislate in the field of maritime law is implied from the grant to the Federal courts in section 2 of article III, of the Federal Constitution, of judicial power in all cases involving admiralty and maritime jurisdiction. It is, however, well settled that in the maritime field, just as in the field of interstate commerce generally, the state has power to act in matters of merely local concern, which do not require uniform national legislation. (*Cooley* v. *Board of Wardens*, 12 How. [U. S.] 299.) One engaged in an interstate business may be lawfully subjected to a state tax upon the instruments employed in that business (*Western Union Telegraph Co.* v. *Attorney-General*, 125 U. S. 530), and this is so even though such commerce is maritime in nature. (*Old Dominion S. S. Co.* v. *Virginia*, 198 U. S. 299, 305.)

In addition, by section 1606, subd. (a) of the Federal Tax Act, the Congress has declared that state unemployment insurance laws may be applied to interstate commerce. And in *Perkins* v. *Pennsylvania*, (314 U. S. 586, affg., 342 Penn. St. 529) the Supreme Court has held that there is no constitutional obstacle under the commerce clause to the application of the Pennsylvania unemployment insurance law to those employed in interstate commerce. This would seem to be a conclusive determination that unemployment among those engaged in interstate commerce in general is a matter of local concern as to which no uniform national legislation is needed and in which field, therefore, the states may constitutionally legislate.

As to the second objection noted above and based upon the limitations upon state legislation stated in *Southern*

Pacific Co. v. *Jensen*, 244 U. S. 205, it would seem to be a sufficient answer to repeat that the enactment in question is a taxing statute designed to raise funds for a state purpose. It does not, therefore, attempt to alter the contract of employment between master and servant or to change the rights and remedies enforceable in admiralty as incidental to that relationship. It does not create any new rights or liabilities between the parties. Nothing contained [fol. 91] therein would cause a court of admiralty to alter in any respect the body of law which it applies to the cases pending before it.

That a state may, within prescribed limits, enter into the field of maritime law and add to or modify remedies enforceable in admiralty was conceded by Mr. Justice McReynolds in the *Jensen* case. In *Just* v. *Chambers* (312 U. S. 383) a statute of the State of Florida, providing that a cause of action for personal injuries shall survive the death of the tort feasor, was held to be applicable in a court of admiralty to an action against the owner of a vessel on account of injuries occurring on navigable waters within the State boundaries. The State law, it was said, did not offend the criteria of essential purpose and uniformity laid down in the *Jensen* case. If, therefore, the states may, within the prescribed limits, actually add to the remedies under maritime law, *a fortiori*, the legislation in the case at bar may not be held to have overridden the limitations set forth in the *Jensen* case.

Respondents point to a line of authorities (*Southern Pacific* v. *Jensen, supra; Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Western Fuel Co.* v. *Garcia*, 257 U. S. 233; *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469) holding workmen's compensation statutes invalid as interfering with the characteristic features and essential uniformity of admiralty law. These cases all rest upon the principle that the workmen's compensation laws set aside the common law rules respecting the rights and liabilities of employer and employee and substituted new rules for determining such rights and liabilities. These statutes become a part of the contract and thereby directly affect the rights and duties between the parties. As was said by this court in *Matter of Doey* v. *Howland Co.* (224 N. Y. 30, 36): "An award under the Workmen's Compensation Law is not made on

the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract. (*Matter of Post* v. *Burger & Gohlke,* 216 N. Y. 544.) The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for injuries sustained, or if death results, a certain sum to dependents."

A clear distinction between these cases and that of the unemployment insurance law is that the latter does not in any way operate upon the contract of employment or interfere with maritime and admiralty jurisdiction. The payment of an excise tax upon the privilege of employing others can no more be considered an unwarranted intrusion by the states into admiralty jurisdiction than can numerous other state taxes previously upheld; for instance, franchise taxes upon towing companies (*People ex rel. Cornell Steamboat Co.* v. *Sohmer,* 235 U. S. 549); taxation of insurance companies upon the writing of marine insurance policies (*Aetna Ins. Co.* v. *Houston Oil & Transport Co.,* 49 Fed. Rep. [2d] 121); taxes upon shipping (*Transportation Co.* v. *Wheeling,* 99 U. S. 273); and tolls levied upon interstate and for- [fol. 92] eign shipping using state-improved waterways. (*Sands* v. *Manistre River Improvement Co.,* 123 U. S. 288.)

It follows that there is no constitutional objection to coverage of maritime employments by the Unemployment Insurance Act of New York State.

We are thus brought to the second question, namely, whether by virtue of the provisions of section 1607 (subd. c) (par. 4) of the Internal Revenue Code (U. S. Code, tit. 26), the officers and members of the crew of a vessel on the navigable waters of the United States have been specifically excluded by Congress from coverage by state laws. We may assume that Congress has the constitutional right under the admiralty clause of the Federal Constitution, to exclude maritime employments from coverage by state unemployment insurance.

In other words does the fact that the Federal Act in the case at bar exempts from its operation the officers and crews of vessels on navigable waters prevent the states from covering maritime employment in the unemployment insurance laws which they have enacted?

From the nature of the independent power reserved to the states of taxing for their own support and to promote the general welfare of their inhabitants, there has been developed the principle that it will not be presumed that Congress intended to exclude the reserved powers of the state by virtue of paramount powers vested in Congress by the Federal Constitution unless an actual conflict exists between Federal and State legislation. In *Savage* v. *Jones* (225 U. S. 501) the court lays down this principle (at p. 533): "But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State."

A comparison of the Federal tax act and our State unemployment insurance act shows that there is no actual conflict between them even when the State Act is construed to cover employments expressly exempted under the Federal taxing statute.

The Federal statute, of course, is not an unemployment insurance law. It is a mere taxing statute but contains a provision allowing ninety per cent of contributions exacted thereunder to be credited by employers against contributions paid under certified state systems. This credit arrangement was designed to give the states an incentive to enact their own unemployment insurance laws and to protect those states which enacted such laws against being put at a competitive disadvantage as against other states which might fail to take such action. Congress evidently believed that these objects could be accomplished by taxing only certain kinds of employment while exempting other kinds. The states in creating their unemployment systems, on the other hand, had different objectives in view in canvassing [fol. 93] the kinds of employment to be covered or excluded under their statutes. Their problem was to decide what types of employment seriously required the protection of an unemployment compensation law and what types could practically be included within such a system. Whatever types of employment the Congress might exclude, the states might exempt wholly different types upon the ground that employees in these categories did not require such protection or else that it would be impracticable or impolitic

to furnish them with such protection. There is, therefore, no necessary similarity as to the types of employment either covered or exempted by the Federal and state statutes respectively.

The legislative history and the judicial interpretation of the Federal statute amply demonstrate that it was not intended thereby to strait-jacket the states in the enactment of their own unemployment insurance laws. (See Senate Report, No. 628, Cal. No. 661, 74th Congress, p. 14; *Steward Machine Co.* v. *Davis, supra,* at pp. 593, 594.) The conclusion is inescapable that Congress intended to leave to the states the widest possible latitude in setting up their unemployment compensation system both as to the kind and extent of coverage provided. This broad policy may not be overriden by the exemptions contained in section 1607 (subd. c) (par. 4).

One word should be said in conclusion as to the argument advanced that great practical difficulties lie in the way of the states providing benefits for seamen, the nature of whose work may take them into many other states and even into foreign parts. A picture is drawn of the hopeless confusion into which maritime employment may be plunged if a number of states attempted to apply conflicting state statutes to the same employer-employee relationship. The difficulty conjured up would appear to be more imaginary than real and in no event could affect the result arrived at herein. It may be that Congress will in future decide to appropriate the entire marine field to a uniform unemployment insurance system. Such congressional action might effectively oust the states from the field because of the paramount power vested in Congress by section 2 of article III of the Federal Constitution. It is sufficient for the purpose of these appeals, however, to say that no such obstacle stands in the way of state legislation at the present time.

It follows that in the cases of the claimants, Cassaretakis and Bergen, the orders of the Appellate Division should be reversed and the determination of the Unemployment Insurance Appeal Board affirmed; in the cases involving Sheredos, Knowlson, Schein and Smith, the orders of the Appellate Division and the determination of the Unemployment Insurance Appeal Board should be reversed and the cases remitted to such Appeal Board for proceedings in

accordance with this opinion, all with costs in this court and in the Appellate Division.

LEHMAN, Ch. J., LOUGHRAN, RIPPEY, LEWIS, CONWAY and DESMOND, JJ., concur.

Ordered accordingly.

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

[fol. 94] At a term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Department, held at the Court House, City of Albany, State of New York, commencing on the 21st day of September, 1942.

Present: Hon. James P. Hill, Presiding Justice; Hon. John C. Crapser, Hon. F. Walter Bliss, Hon. Christopher J. Hefferman, Hon. Gilbert V. Schenck, Associate Justices.

In the matter of the Claim for Benefits under Article 18 of the Labor Law, made by JOSEPH BERGEN, Claimant,

INTERNATIONAL ELEVATING COMPANY, Employer-Respondent

FRIEDA S. MILLER, Industrial Commissioner, Appellant

ORDER AND JUDGMENT ON REMITTITUR—September 21, 1942

Appellant above named having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division, Third Department, entered in the office of the Clerk of said Court on the 10th day of December, 1941, unanimously reversing the decision of the Unemployment Insurance Appeal Board of the New York State Department of Labor, dated the 6th day of December, 1940, with costs against the Industrial Commissioner; and the said appeal having been argued at the Court of Appeals by John J. Bennett, Jr., Attorney General, Henry Epstein, Solicitor General, for Appellant; and by Cullen & Dykman, by Jules Haberman, Esq. of Counsel for the Respondent; [fol. 95] and after due deliberation the Court of Appeals having rendered a decision and opinion herein and having ordered that the said order so appealed from be reversed and the determination of the Unemployment Insurance Appeal Board be affirmed with costs in this Court and in the Appellate Division and having further ordered that the

matter be remitted to the Appellate Division of the Supreme Court, Third Department, there to be proceeded upon according to law; and the Remittitur from the said Court of Appeals having been filed herein.

Now, upon motion of John J. Bennett, Jr., Attorneys General, Attorney for the Industrial Commissioner, it is hereby

Ordered that the order of the said Court of Appeals be and the same hereby is made the order of this Court, and it is further

Ordered that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and the determination of the Unemployment Insurance Appeal Board be affirmed with costs in this Court and in the Appellate Division.

(s) John S. Herrick, Clerk, by Clyde Barber, Deputy Clerk.

[fol. 96] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—January 6, 1943

The petition of International Elevating Company, the appellant in the above entitled cause, for an appeal in the above cause to the Supreme Court of the United States from the order of the Court of Appeals of the State of New York, having been filed with the Clerk of this Court and presented herein, accompanied by assignment of errors and prayer for reversal, and statement as to jurisdiction, all as provided by the Rules of the Supreme Court of the United States, and the record in this cause having been considered, it is hereby

Ordered that an appeal be and it is hereby allowed to the Supreme Court of the United States from a final order of the Court of Appeals of the State of New York made and entered in said Court the 15th day of October, 1942 as prayed for in said petition, and that the Clerk of the Ap-[fol. 97] pellate Division of the Supreme Court of the State of New York, Third Department, shall, within forty days from this date, make and transmit to the Supreme Court of the United States under its hand and the seal of said Court a true copy of the material parts of the record herein

which shall be designated by praecipe or stipulation of the parties, or their counsel herein, all in accordance with the Rules of the Supreme Court of the United States.

It Is Further Ordered that the said appellant shall give a good and sufficient bond in the sum of $250.00 that said appellant shall prosecute said appeal to effect and answer all costs if he fail to make his appeal good, and that said bond, when filed and approved, shall stay the sending down of the mandate herein and all proceedings in this cause until the final disposition of this cause by the Supreme Court of the United States.

Dated: January 6, 1943.

Irving Lehman, Chief Judge of the Court of Appeals, State of New York.

[fol. 98] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL—December 30, 1942

To the Chief Judge of the Court of Appeals of the State of New York:

Your petitioner, International Elevating Company, respectfully shows:

1. Petitioner, a corporation organized and existing under the laws of the State of New Jersey, is the appellant in the above entitled cause.

2. Petitioner employed Joseph Bergen, claimant herein, during the years 1938 and 1939 as a grain trimmer attached to the "Themis", a documented vessel under the laws of the United States, one of its floating, self-propelled elevators operating on the navigable waters of New York Harbor and tributary streams.

[fol. 99] 3. This cause began with the filing by claimant in the New York State Department of Labor, Division of Placement and Unemployment Insurance, of a request for a hearing to determine whether or not claimant's employment by petitioner was covered by the New York unemployment insurance law.

4. This cause was initially heard and determined by a Referee of the Industrial Commissioner, the appellee, whose decision, dated July 9, 1940, held that the unemployment insurance law of the State of New York nonetheless applied to his employment contrary to the contentions of petitioner that the nature of claimant's employment, which was exclusively maritime in character, precluded its application. The Referee stated in his opinion (Record on Appeal, fol 51):

"The Unemployment Insurance Act is silent with respect to maritime workers. Nevertheless interpretation may not be made that would be is conflict with the provisions of the Constitution of the United States which empowers Congress to legislate with respect to maritime and admiralty matters."

5. On appeal from the decision of the Referee aforesaid, the Unemployment Insurance Appeal Board affirmed his decision and rendered an opinion which again recognized the existence of an issue under the Constitution of the United States thus (Record on Appeal, fols. 22-24):

"There is no provision in the New York State Unemployment Insurance Law specifically exempting from its [fol. 100] provisions an officer or member of the crew of a vessel on the navigable waters of the United States. The Act therefore applies to the claimant unless it is in conflict with some provision of the State or Federal Constitution. The employer contends that as far as the claimant is concerned, the application of the Act to him would bring said Act in conflict with that provision of the Federal Constitution which grants to the United States Government exclusive jurisdiction over admiralty and maritime matters. We have previously held that the maritime nature of employment in and of itself does not exempt the employer from the provisions of the Unemployment Insurance Law."

6. On appeal from the Board's decision aforesaid, the Appellate Division of the Supreme Court reversed, rendering an opinion in which the court stated (Record on Appeal, fols. 242-243):

"This jurisdiction is pursuant to section 2 of article III of the Constitution of the United States. It cannot be delegated to the several States. The grant of admiralty juris-

diction to the federal government was: '* * * to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation * * *.' (*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149). This purpose would be violated if the Board's decision herein were upheld."

7. On appeal to the Court of Appeals, it was decided that the unemployment insurance law is applicable by its terms to maritime workers such as claimant herein and that the Constitution of the United States presents no obstacle to such an application; accordingly on remittitur from the Court of Appeals, the order of reversal of the Court of Appeals made and entered therein on the 15th day of October, 1942, was made the order of the Supreme Court, Appel-[fol. 101] late Division, Third Department, by order filed in that Court the 22nd day of October 1942.

8. The Court of Appeals is the highest court of the State of New York in which a decision herein can be had.

9. In this cause there is drawn in question the validity of a statute of New York State on the ground that said statute is repugnant to the Constitution and laws of the United States, and the decision is in favor of its validity, notwithstanding your petitioner's contention that said statute violates Section 2 of Article III of the Constitution of the United States.

Therefore, in accordance with § 237(a) of the Judicial Code, and in accordance with the Rules of the Supreme Court of the United States, your petitioner respectfully shows this court that the case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, to wit: under § 237(a) of the Judicial Code, a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

The errors upon which your petitioner claims to be entitled to an appeal are more fully set out in the assignment of errors, filed herewith, pursuant to Rules 9 and 46 of the Rules of the Supreme Court of the United States; and there are likewise filed herewith statements as to the jurisdiction of the Supreme Court of the United States, as provided by Rules 12 and 46 of the Rules of the Supreme Court of [fol. 102] the United States.

Wherefore, your petitioner prays for the allowance of an appeal from the said Court of Appeals of the State of New York, the highest court of said state in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final order of the said Court of Appeals reversing the order of the Appellate Division of the Supreme Court, Third Department, of the State of New York herein, may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Appellate Division of the Supreme Court, Third Department under his hand and the seal of said Court, may be sent to the Supreme Court of the United States, as provided by law, and that an order be made touching the security to be required of the petitioner, and that the cost bond tendered by the petitioner be approved and that the said appeal may operate as a supersedeas.

Dated: December 30, 1942.

Arthur E. Goddard, Counsel for Petitioner.

[fol. 103] Supreme Court of the United States

[Title omitted]

Assignment of Errors—December 30, 1942

The petitioner assigns the following errors in the record and proceedings in this cause:

1. The State Court erred in holding that the unemployment insurance law, New York Labor Law, Article 18 (Consolidated Laws, Chapter 31), when applied to workers, such as claimant, engaged solely in maritime employment, is valid and does not violate the provisions of Article III, Section 2 of the Constitution of the United States.

2. The State Court erred in holding that said law, when applied to workers, such as claimant, engaged solely in maritime employment, constituting services as an officer or member of the crew of a vessel upon the navigable waters of the United States under applicable rulings of federal [fol. 104] administrative authorities, and therefore outside the scope of the Federal Unemployment Tax Act, Section

1607 (c)(4), is valid and does not violate the provisions of Article III, Section 2 of the Constitution of the United States.

3. The State Court erred in refusing to review the determination of the Referee and the Unemployment Insurance Appeal Board that this claimant was not an officer or member of the crew of a vessel upon the navigable waters of the United States, notwithstanding a determination to the contrary by the federal administrative authorities.

4. The State Court erred in holding that Section 534 of said law, providing that determinations of fact by the said Appeal Board shall be final, when applied to a determination of such a *jurisdictional* fact as whether or not claimant was performing service as an officer or member of the crew of a vessel on the navigable waters of the United States, is valid and does not violate Article III, Section 2 of the Constitution of the United States.

5. The State Court erred in failing to hold, as a matter of law, that claimant was a member of the crew of a vessel on the navigable waters of the United States.

Wherefore, on account of the errors hereinbefore assigned, appellant prays that the said order of the Court of Appeals and the said order of the Appellate Division of the Supreme Court, Third Department, entered thereupon [fol. 105] in the above entitled cause on the 22nd day of October, 1942, be reversed and an order directed to be entered in favor of the appellant.

Dated: December 30, 1942.

Arthur E. Goddard, Counsel for Appellant.

[fol. 106] Cost Bond on Appeal for $250.00 approved; omitted in printing.

[fols. 107-110] Citation in usual form showing service on Nathaniel L. Goldstein omitted in printing.

[fol. 111] SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR RECORD—February 1, 1943

To the Clerk of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department:

You are hereby requested to make a transcript of the record herein to be transmitted to the Supreme Court of the United States pursuant to the order of the Chief Judge of the Court of Appeals of the State of New York, dated January 6, 1943, in the above mentioned cause and to include in such transcript:

1. The papers and records as shown in the return and transcript on file in the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, making the order and judgment of the Court of Appeals the order and judgment of said Appellate Division;

2. The papers filed in the Office of the Clerk of said Court pursuant to the Rules of the Supreme Court of the United States.

Dated: February 1, 1943.

Arthur E. Goddard, Counsel for Appellant.

[fols. 112-113] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 114] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed February 15, 1943

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon, and represents that the whole of the record as filed is necessary for the consideration of the case.

Dated: Brooklyn, New York, February 10, 1943.

Arthur E. Goddard, Counsel for Appellant.

No. 723

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—March 8, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The Solicitor General is requested to file a brief as amicus curiae and to participate in the oral argument if he so desires.

March 8, 1943.

Endorsed on Cover: File No. 47,224. New York, Supreme Court, Term No. 723. International Elevating Company, Appellant, vs. Frieda S. Miller, as Industrial Commissioner of the State of New York, and Joseph Bergen. Filed February 11, 1943. Term No. 723, O. T. 1942.

FILE COPY

FILED
FEB 11 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 723

INTERNATIONAL ELEVATING COMPANY,
EMPLOYER,
Appellant,

vs.

FRIEDA S. MILLER, INDUSTRIAL COMMISSIONER, ET AL.,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

ARTHUR E. GODDARD,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 723

INTERNATIONAL ELEVATING COMPANY,
EMPLOYER,

Appellant,

vs.

FRIEDA S. MILLER, INDUSTRIAL COMMISSIONER, ET AL.,
Appellee.

STATEMENT AS TO JURISDICTION.

I.

The jurisdiction of the United States Supreme Court to review the decree in question upon appeal is sustained by § 237(a) of the Judicial Code.[1]

In this cause there is drawn in question the validity of the unemployment insurance of the State of New York, New York Labor Law, Article 18 (Chapter 31 of the Consolidated Laws) insofar as it is applied in the maritime field.

This law, which sets up a system of unemployment compensation, provides for payment to an unemployment in-

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[1] 28 U. S. C. §344.

surance fund of contributions by employers, measured by a percentage of their payrolls, and for payment of benefits to qualified employees who suffer unemployment. It contains no express exception of employment which is maritime in character and has been applied to such employment in this cause.

The final order sought to be reviewed was made and entered in the Court of Appeals of the State of New York, October 15th, 1942. The application for appeal in support of which these statements are made was presented December 30, 1942.

II.

The case involves the authority of New York State to apply its unemployment insurance law to an employment which is concededly maritime in character, contrary to Section 2 of Article III of the Constitution of the United States.

The application by a state of a statute, otherwise valid, beyond its proper jurisdiction under the Constitution draws in question to this extent the validity of the statute thus applied. A final decree sustaining such an improper application of a state statute may properly be reviewed on appeal by the Supreme Court of the United States.

Stewart & Co. v. *Sadrakula*, 309 U. S. 94.

III.

The Questions Presented Are Substantial.

In January 1936, the Attorney General of the State of New York rendered a published opinion, in which it was declared that, even in the absence of any express exception, the unemployment insurance law of New York could not be applied to employment entirely maritime in character. This opinion was based on Section 2 of Article III of the

Constitution of the United States, which had been held to limit the application of state workmen compensation laws.

Southern Pacific Co. v. *Jensen*, 244 U. S. 205.
Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149.
Washington v. *Dawson & Co.*, 264 U. S. 219.

Almost all of the forty-eight states recognized a similar limitation on their jurisdicton and expressly enacted a maritime exception in their respective unemployment insurance laws.

New York employers in the maritime field naturally relied on the opinion of their Attorney General. For a number of years they assumed that contributions under the unemployment insurance law were not to be taken into account in determining their general overhead. Not until June 1940, did this appellant learn that the Industrial Commissioner of the State did not concur with the Attorney General.

That the entire maritime industry is seriously concerned with the question here raised requires little argument. The financial stake of maritime employers generally is obvious: in New York they may be required to make contributions on payrolls for almost five years during which such contributions were apparently not to be exacted; elsewhere, by repeals of express exceptions they may be subjected to contributions in the future.

Maritime employees are denied the benefits of unemployment compensation by express exceptions in the unemployment laws of the various states, predicated on the constitutional doctrine repudiated in the present case as being inapplicable.

If, indeed, there is no constitutional obstacle standing in the way of application of state unemployment insurance laws to maritime workers, a determination by the United States Supreme Court to this effect would be the most

effective means of securing unemployment benefits for maritime employees generally, since it would serve general notice on all the states that their laws could be applied in the maritime field without violating the Constitution of the United States.

IV.

The question here presented was appropriately raised at the hearing before the Referee of the Industrial Commissioner.

The employer relied at the hearing and thereafter on rulings of the Federal administrative authorities (Record on Appeal, pp. 70, 71) and on a letter to the appellant from the Division of Unemployment Insurance of the State of New York (Record on Appeal, pp. 58, 59). The latter contained a statement that "the question of our jurisdiction of employees working on vessels operating in navigable waters in the United States may be involved. Employees thus employed are not covered by the law." After the hearing at which the letter from which the above quotation is made was offered in evidence on behalf of the appellant, the Referee rendered a decision in which he stated (Record on Appeal, fol. 51):

> "The Unemployment Insurance Act is silent with respect to maritime workers. Nevertheless interpretation may not be made that would be in conflict with the provisions of the Constitution of the United States which empowers Congress to legislate with respect to maritime and admiralty matter."[1a]

On appeal from the decision of the Referee holding that claimant had been engaged in employment subject to the New York law, the Unemployment Insurance Appeal Board affirmed, conceding, however, that claimant's employment

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[1a] All opinions rendered in this proceeding are appended hereto as required by Rule 12 of the Rules of the United States Supreme Court.

was maritime in character. The Board said in its opinion (Record on Appeal, fols. 22-24):

> "There is no provision in the New York State Unemployment Insurance Law specifically exempting from its provisions an officer or member of the crew of a vessel on the navigable waters of the United States. The Act therefore applies to the claimant unless it is in conflict with some provision of the State or Federal Constitution. The employer contends that as far as the claimant is concerned, the application of the Act to him would bring said Act in conflict with that provision of the Federal Constitution which grants to the United States Government exclusive jurisdiction over admiralty and maritime matters. We have previously held that the maritime nature of employment in and of itself does not exempt the employer from the provisions of the Unemployment Insurance Law."

The Board held that since claimant was not an officer or member of the crew within the exemption provided by Section 1607(c)(4) of the Internal Revenue Code (formerly Section 907 (c)(3) of Title IX of the Social Security Act), he was entitled to benefits under the state law.

Since, under Section 530.2 of the Labor Law (Chapter 31 of the Consolidated Laws) the Board's determination with respect to this individual claim was binding on appellant with respect to all similar employees, an appeal was taken to the Appellate Division of the Supreme Court of the State of New York, Third Department.

The Appellate Division reversed the Unemployment Insurance Appeal Board, holding that the application of the unemployment insurance law to claimant was a trespass on jurisdictional domain of the United States.[2] The Court in its opinion said (Record on Appeal, fols. 242-243):

> "This jurisdiction is pursuant to section 2 of article III of the Constitution of the United States. It cannot

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[2] 262 App. Div. 654.

be delegated to the several States. The grant of admiralty jurisdiction to the federal government was: '* * * to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation * * *.' *(Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 194.) This purpose would be violated if the Board's decision herein were upheld."

The Appellate Division cited as an additional ground for reversal, the fact that Section 1607 (c)(4) of the Internal Revenue Code (Section 907 (c)(3) of Title IX of the Social Security Act) excepted "service performed as an officer or member of a crew of a vessel in navigable waters in the United States."

The Industrial Commissioner appealed from the Appellate Division to the Court of Appeals and the latter court reversed the Appellate Division, holding:[3]

(1) There is no constitutional obstacle to the application of the unemployment insurance law to maritime employments generally;

(2) There is no constitutional barrier by reason of the exception of employment by an officer and members of the crew on a vessel in navigable waters of the United States, enacted by Congress in the Social Security Act (Internal Revenue Code, Section 1607 (c)(4); and

(3) There was substantial evidence to sustain the findings by the Appeal Board that claimant was not an officer or member of a crew of a vessel upon the navigable waters of the United States and that in consequence the determination of the Appeal Board was conclusive on the courts.

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[3] 289 N. Y. 119.

Conclusion.

This is a proper cause for the allowance of an appeal to the Supreme Court of the United States.

Respectfully submitted,

ARTHUR E. GODDARD,
Counsel for Appellant.

APPENDIX "A".

Findings of Fact and Decision of Referee.

STATE OF NEW YORK DEPARTMENT OF LABOR,
UNEMPLOYMENT INSURANCE REFEREES' UNIT.

Index No. 533-96-40R.

Date: July 9, 1940.

S. S. No. 052-03-7216.
Claimant: Joseph Bergen.
Referee: Henry Eisen.
At: 342 Madison Avenue, N. Y. C.
On: June 12, 1940.

Appearances:

Joseph Bergen, Claimant.

International Elevating Co., Employer, by Frank N. Van Emberg, Assistant Treasurer.

Cullen & Dykman, Esqs., Counsel for Employer, by Robert Lisle, Esq., of Counsel.

Harry Rosen, Esq., representing the Legal Bureau, Division of Placement and Unemployment Insurance.

Issue:

Whether or not claimant's employment is maritime in nature and as such exempted under the provisions of the Unemployment Insurance Law.

From the testimony adduced, the following are the

Findings of Fact:

The claimant was employed by the corporation hereinafter designated in 1938 and 1939. His duties were those of a "header" or "trimmer" in connection with handling of grain. These services were performed on vessels plying in navigable waters in and about the New York harbor and tributary streams.

The vessels are known as grain elevators, documented under the laws of the United States. Since the home port

is New York City, the elevators are duly registered at the New York Custom House. The hailing port is Jersey City, New Jersey. The floating elevators are self-propelled and generate their own power. Their function is to transfer grain in bulk to ocean-going vessels. This grain is brought to the New York harbor in vessels from other ports. The ultimate destination of the grain is the foreign countries.

The principal handling method involves the use of an elevator leg for direct vertical lifts. An endless chain of buckets scoop up the grain and carry it overhead where it is turned out by inversion of the buckets and dropped into the receiving steamer through a pipe. The work entailed is exclusively related to the handling, transferring and delivering grain in bulk, requiring its weighing, cleaning and storing. Obviously these operations, in the main represent a commercial occupation rather than a maritime pursuit. In no sense is such a vocation allied with navigation or the welfare of a vessel.

The claimant and co-workers are members of a union. This organization, because of a "closed shop" agreement with the employer is the exclusive source of supply of the grain handlers. Compensation for the services of these workers is measured solely by a predetermined fixed union scale of five dollars per thousand bushels handled.

The elevators have full complements of crews, such as captain, engineers, deckhands, etc. This personnel is distinct from the grain workers. It is significant that when the elevator is navigated, the captain is in full command of the elevator. When, however, the elevator is engaged in the process of transferring, trimming, weighing and shoveling the grain, the responsibility for supervision is shifted to a superintendent.

The company herein has not filed reports with or paid contributions to the New York State Unemployment Insurance fund, taking the ground that all grain workers are in maritime employment. A ruling made by the Federal Treasury Department takes the position that such employees are members of crews and are excepted from tax liability under Section 811(b)(5) of the Social Security Act. A similar ruling was made tentatively by a former acting executive director of the Division of Unemployment

Insurance, which however was conditioned upon further information requested from the company but not subsequently supplied.

These ex-parte determinations are not binding upon the claimant. It becomes necessary, therefore, to examine the facts and circumstances to ascertain whether in the instant case, the maritime law has such exclusive jurisdiction as to exempt grain trimmers from the benefits provided in the Unemployment Insurance Law.

The Unemployment Insurance Act is silent with respect to maritime workers. Nevertheless interpretation may not be made that would be in conflict with the provisions of the Constitution of the United States which empowers Congress to legislate with respect to maritime and admiralty matters.

An intrastate tax designed to add a formalized right to wage earners of the instant type who become unemployed through no fault of their own is not in contravention of the substance of admiralty laws. The Unemployment Insurance Act is part of social reforms approved and encouraged by the United States Government. To exclude from coverage a large class of workers who take no part in the navigation of vessels would seem inconsistent with and indeed a negation of the intent to bring all industrial workers within the protection of the Unemployment Insurance Law against the hazards of unemployment, except those specifically exempted by the Act. It is the function of the State to designate the choice of beneficiaries. In the selective process, it is the status and nature of the work which must be given due emphasis, rather than some obscure construction of the maritime law. Thus the opinion is held that no valid reason exists for placing the workers herein considered in the same category as officers and members of the crews of vessels. A similar conclusion was reached by the Appeal Board with respect to dredge workers (Case 1180-39).

The earnings are not in dispute. The employer who is subject to the Unemployment Insurance Law, submitted wage credits corresponding to the sums tabulated herein.

It is conceded also that the greater portion of the work performed was in the waters adjacent to the State of New York. This data is detailed in an affidavit filed in the claims folder and made part of the record, and supplements the evidence adduced.

Based upon the record and testimony, the amounts as set forth herewith are allowed:

		1938.		
	First Quarter.	Second Quarter.	Third Quarter.	Fourth Quarter.
International Elevating Co., 2 Broadway, N. Y. C.	305.18	110.82	279.21	195.23
		1939.		
	143.80	8.53	185.71	416.03

Decision:

Upon all the evidence, I find that the claimant is not an officer or a member of a crew of a vessel. His employment is not exempted under the provisions of the Unemployment Insurance Law. The employer herein is liable for tax contributions on his wages and the wages of all others similarly situated. I also find that the claimant had earnings in covered employment in the sums as herein tabulated and is entitled to benefit rights based upon these figures, subject to local office records as to weeks of total unemployment.

Copy of this decision is being forwarded to the Bureau of Tax and Wage Records for the collection of contributions due.

HENRY EISEN,
Referee.

Joseph Bergen, 7314 Fifth Ave., Brooklyn, N. Y.
International Elevating Co., 2 Broadway, N. Y. C.
Harry I. Rosen, Esq., 342 Madison Ave., N. Y. C.
Cullen & Dykman, 177 Montague Street, Brooklyn, N. Y.
L. Goldberg, Bk. 347, 6/12/40.
E. Taylor, Bk. 197, 7/8/40.

APPENDIX "B".

Findings of Fact, Opinion and Decision of Unemployment Insurance Appeal Board.

State of New York — Case #3538-40

Department of Labor — 533-96-40R

Unemployment Insurance Appeal Board

Re: Name

S. S. No..... Employer No.....

The employer appeals from the decision of the referee dated July 9, 1940, holding that claimant worked in employment subject to the Unemployment Insurance Law and is entitled to be credited with his earnings therein.

Hearings were held before the referee at which the claimant, the employer corporation, by its assistant treasurer, its attorney and a representative of the Industrial Commissioner were present and were accorded full opportunity to be heard. Briefs have been submitted on behalf of the employer and the Industrial Commissioner for the consideration of the Board.

Based on the record and the testimony in this case, the Board makes the following

Findings of Fact:

Claimant was employed by appellant during 1938 and 1939. There is no dispute as to the length of claimant's employment or as to the amount of his earnings. The question in dispute is whether or not claimant worked in employment subject to the law.

Claimant was a ship-trimmer in connection with the handling of grain. His services were performed on floating grain elevators, which are documented under the laws of the United States. These elevators are self-propelled and generate their own power. The function of the elevators is to transfer grain in bulk between ocean-going vessels and canal boats or other boats. The work of the claimant dur-

ing 1938 and 1939 was the storing and trimming of grain in the holds of the ships.

Claimant was a member of a local union of the International Longshoremen's Association. The employer had a closed shop agreement with said union and only members of the union worked on the grain elevators. Compensation for the services of the union members was measured by a predetermined fixed scale of $5.00 for each thousand bushels handled. The trimmers usually met in a union meeting room on South Street in the City of New York, and if a job was available, all would proceed from the meeting room to the job.

Claimant did not perform any work on the grain elevator until it had been tied up alongside the steamer and the harbor vessel between which the transfer of grain was to be effectuated. Occasionally, after one job was done there was another job to be done on a vessel tied up at a different pier. In that event, claimant had his choice of proceeding by land to the other job or remaining on the grain elevator and being transported thereon, in which event he did not participate in the navigation of the vessel.

Claimant's work was all performed under the supervision of a superintendent in appellant's employ and not under the supervision of the captain of the grain elevator.

While the boat was under way from one pier to another, it was then under the supervision of the captain of the vessel who was a licensed individual.

Claimant did not sign any ship's articles. He was not fed on the ship and when he went to lunch he had to go to a restaurant situated on the shore. Claimant lived in the Borough of Brooklyn and went home to his residence every night. He worked eight hours a day and any work done thereafter was considered overtime. On a few rare occasions when the claimant was too tired to go home, he slept on the floor of the boat, as there were no sleeping accommodations on the boat.

It has been conceded by the employer that the greater part of the work performed by the claimant in 1938 and 1939, prior to June 3, 1939, was in the State of New York and that the base of operations after June 3, 1939, was in the State of New York.

OPINION:

The issue to be determined herein is whether or not the claimant worked in employment subject to the Unemployment Insurance Law.

It is the contention of the appellant that the claimant was an officer or member of a crew, and therefore comes within the exemption as outlined under the Social Security Act and the Internal Revenue Code, and that under said circumstances the State of New York has no jurisdiction in this case.

Title 9 of the Social Security Act as amended is not contained in the Internal Revenue Code, except Section 904. The Code provides:

"The term 'employment' means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—

• • • • • • •

(4) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States; • • •" (Section 1607-(c) (4)).

There is no provision in the New York State Unemployment Insurance Law specifically exempting from its provisions an officer or member of the crew of a vessel on the navigable waters of the United States. The Act therefore applies to the claimant unless it is in conflict with some provision of the State or Federal Constitution. The employer contends that as far as the claimant is concerned, the application of the Act to him would bring said Act in conflict with that provision of the Federal Constitution which grants to the United States Government exclusive jurisdiction over admiralty and maritime matters. We have previously held that the maritime nature of employment in and of itself does not exempt the employer from

the provisions of the Unemployment Insurance Law (Appeal Board 1180-39).

There is no question that the grain elevator on which the claimant performed his services was a vessel within the meaning of that term and there is also no question that the waters on which said services were performed were navigable waters of the United States.

Therefore, the question to be decided by us is whether or not the claimant's services were performed as an officer or member of a crew. If we find that such services were performed as an officer or member of a crew, then the appellant must prevail and New York State would have no jurisdiction over the claimant and the employer herein. If, however, we find that the claimant's services were not performed as an officer or member of a crew, then the claimant is an employee, working in employment subject to the Unemployment Insurance Law.

Regulation 90 relates to the excise tax on employers under Title 9 of the Social Security Act, which refers to unemployment insurance tax on employers of eight or more. Article 206(3) of Regulation 90 gives the following definition of "officers and members of the crew":

"The expression 'officers and members of the crew' includes the master or officer in charge of the vessel, however designated, and every individual, subject to his authority, serving on board and contributing in any way to the operation and welfare of the vessel. The exception extends, for example, to services rendered by the master, mates, pilots, pursers, surgeons, stewards, engineers, firemen, cooks, clerks, carpenters, deck hands, porters, and chambermaids and by seal hunters and fishermen on sealing and fishing vessels."

Since the phrase "officers and members of the crew" is a phrase of exclusion, it must therefore be given a narrow construction. The appellant relies on the case of *The Buena Ventura*, 243 Fed. 797, to the effect that a wireless operator hired and paid by an independent contractor was considered a member of a crew. In that case, the justice presiding stated that it was his opinion that a wireless operator was

a far more important person in the safe operation of a voyaging vessel than a fireman, cook, or the like, but said:

"It is preferred to put the decision on this broad ground: i.e.; that a man who serves the ship as a result of a contractual relation of any kind, and serves her *in her navigation*, is a member of the crew and entitled to the privileges of a seaman." (*The Buena Ventura*, 243 Fed. 797). (Italics ours.)

The Justice further went on to give a definition of the word "crew" as follows:

"The word 'crew' is explicitly considered in *United States* v. *Winn*, 3 Sum. 209 Fed. Cas. No. 16,740. What Justice Story there said has not been improved upon, though the language of Dodge, J. in *The Bound Brook* (D. C.), 146 Fed. at 164 may be quoted as a fair summary:

'When the "crew" of a vessel is referred to, those persons are naturally and primarily meant who are on board her *aiding in her navigation*, without reference to the nature of the arrangement under which they are on board • • •.'" (Italics ours.)

Judge Deadly aptly stated the definition as follows:

"The words 'crews of the vessels' as here used, include all of the ship's company—all the seamen and officers except the captain (Rap. and L. Law Dict. Verb. 'crew'—*U. S.* v. *Winn*, 3 Sum. 209).

"The crew of a vessel—the ship's company—in a general sense, comprises all persons, who, in pursuance of some contract or arrangement with the owner or master are on board the same *aiding in the navigation thereof*" (*The Marie* (*Dominick Dupee, Libellant*), 49 Fed. 287). (Italics ours.)

It is to be expressly noted, therefore, that in order for the work performed by the claimant in the instant case to come within the phrase "officers and members of the crew" he must contribute to the operation and welfare of the vessel and aid in the navigation thereof.

In the instant case, the claimant did not start to work until the grain elevator was tied alongside the boat either from which or to which the grain was to be transferred. At that moment the captain relinquished control and the superintendent in charge took over the operation of the transfer of the grain. The work performed by the claimant was merely transferring the grain between two boats. The work performed by the claimant was not essential and did not contribute to the operation and welfare of the vessel as a means of navigation, nor did his work aid in the navigation of the boat.

The claimant never performed any work while the elevator was being transported from one pier to another, but started his work after the elevator had been tied alongside the boat to which the grain was to be transferred.

The claimant belonged to a union of trimmers. They met in a union meeting room in South Street, New York. They proceeded from said union meeting room to the job, wherever said job was located. They worked eight hours a day and any time spent working thereafter was considered overtime. They were not fed on board ship. It was unnecessary for the claimant or any member of the union to sign ship's articles. Claimant was under the supervision of a superintendent who was a different person than the master of the boat. The master of the boat, the captain, was necessarily a licensed individual and the crew consisted of engineers, firemen and deckmen.

Since we have come to the conclusion that the work performed by the claimant was not in furtherance of the operation and welfare of the vessel as an instrument of navigation, it necessarily follows that the claimant worked in employment subject to the Unemployment Insurance Law.

Decision:

Claimant worked in employment subject to the Unemployment Insurance Law and is entitled to be credited with his earnings as fixed by the referee.

The decision of the referee is affirmed.

Dated: December 6, 1940.

(S.) I. D. Neustein,
Member.

APPENDIX "C".

Opinion of Appellate Division.

262 App. Div. 654.

SCHENCK, *J.*:

This is an appeal by International Elevating Company, an employer, from a decision of the Unemployment Insurance Appeal Board which affirmed a decision of a referee holding the claimant herein to be entitled to benefits under the Unemployment Insurance Law (Labor Law, art. 18, §§ 500-539) of New York State. The controversy is in regard to the question of whether the claimant was or was not engaged in the maritime field or navigable waters of the United States in such manner as to be outside the scope of the power of the State of New York in this respect.

The claimant was employed as a "grain trimmer" in connection with the operation of floating grain elevators owned and operated by the employer herein. The elevators were used in the business of loading and unloading grain to and from vessels in the harbor of New York. In brief, the business of the employer was to transfer grain from one vessel to another as, for example, to transfer a cargo of grain from an ocean-going ship to a barge for further transportation. The elevators used in the business are self-propelling. They are made fast to the steamship from which or to which the transfer is to be made while the ship is at the pier. Thereupon the vessel to which or from which the grain is to be transferred comes alongside the elevator and the transfer is made via the elevator.

Trimmers, such as claimant, work not only on the elevator itself but also in the holds of the discharging or receiving vessels: They operate steam shovels which push the grain to the elevator "leg", see to the "trimming" of the grain in the two holds, handle ship lines and perform other similar duties. They never work on shore. Some of the piers at which the elevators are used are located in New York; others are in New Jersey. Claimant has worked at piers in both States during the period involved herein.

Under the foregoing facts, it seems clear to me that this claimant has been engaged in interstate commerce on the navigable waters of the United States. He is accordingly not subject to the jurisdiction of either New York State or New Jersey (although under the decisions of the Board he might be subject to both), but rather is subject solely, in respect to the matter in controversy here, to the admiralty and maritime jurisdiction of the United States.

This jurisdiction is pursuant to section 2 of Article III of the Constitution of the United States. It cannot be delegated to the several States. The grant of admiralty jurisdiction to the Federal government was: "* * * to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation * * *." (*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149.) This purpose would be violated if the Board's decision herein were upheld.

The New York Workmen's Compensation Law has been held inapplicable to carpenters, rock-loaders, boiler-workers, and watchmen on various types of vessels, engaged in operations similar to those here, on the ground that they were engaged in maritime employment. (See *Matter of Doey* v. *Howland Co.*, 224 N. Y. 30; *Matter of Keator* v. *Rock Plaster Manufacturing Co.*, Id., 540; *Norman* v. *Merritt & Chapman Derrick & Wrecking Co.*, 200 App. Div. 360.)

There is no basic distinction between the Unemployment Insurance Law and the Workmen's Compensation Law so far as fundamental jurisdiction is concerned. It follows that the employer herein cannot be subjected to the New York State Unemployment Insurance Law. The decision of the Board must, accordingly, be reversed.

It is unnecessary to go into the Federal and State statutes that might otherwise be involved. Suffice to say that title IX of the former Social Security Act excepts from the term employment "service performed as an officer or member of the crew of a vessel on the navigable waters of the United States." (Internal Revenue Code (U. S. Code, tit. 26), § 1607, subd. (c), ¶ (4).) This is superfluous in view of the

above-mentioned constitutional provision upon the point but is referred to as being an additional ground for reversal here.

The decision of the Unemployment Insurance Appeal Board should be reversed, with costs.

APPENDIX "D".

Opinion of Court of Appeals.

(Decided sub nom Matter of Cassaretakis 289 N. Y. 119).

FINCH, J.:

These six appeals present the question whether the New York unemployment insurance law (Labor Law, art. 18; Cons. Laws, ch. 31) imposing a pay-roll tax upon all employers of four or more employees, without discrimination and without exception here material, is applicable to marine employments.

In four of the above cases the Unemployment Insurance Appeal Board has found that the claimants had been employed as members of the crews of vessels on the navigable waters of the United States and for that reason the Board held that they were not covered by the unemployment insurance law. In the two remaining cases (*Matter of Cassaretakis* and *Matter of Bergen*) the Board has found that the claimants, although engaged in marine employments, had not been employed as members of the crews of vessels on the navigable waters of the United States, and on this basis held that they were covered by the statute in question.

Upon appeal to the Appellate Division, the decision of the Board in the four cases first mentioned above was sustained. In the other two cases, however, the determinations were reversed upon the ground that, by reason of the admiralty clause of the Federal Constitution, the unemployment insurance statute may not be held applicable to maritime employments.

The definition of employment contained in the New York Act (Labor Law, § 502) is admittedly sufficiently broad to cover all maritime employments, including service as an officer or member of a crew of a vessel upon navigable waters of the United States, provided the whole or greater part of such employment is performed within this State. The Federal statute (U. S. Code, tit. 26, § 1607, subd. c), on the other hand, specifically excludes from the tax levied thereunder services rendered as officer or member of a crew of a vessel upon the navigable waters of the United States.

Whether or not an individual is a member of a crew of a vessel on the navigable waters of the United States presents primarily a question of fact which turns generally on whether the individual serves the ship in her navigation. (*South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 259) In consequence the determination of the Appeal Board, if sustained by substantial evidence, is conclusive upon the courts. (Labor Law, art. 18, § 534; *Matter of Morton*, 284 N. Y. 167.) Upon this record there is substantial evidence to sustain the findings of fact in this regard of the Appeal Board. As to the four claimants who were found to be members of the crews of vessels, Sheredos was a cook on a self-propelled vessel carrying petroleum between points in New York and New Jersey; Schein was an attendant on a speed boat which transported passengers from a New York city pier to the World's Fair; Knowlson was second engineer on a tugboat; Smith was a fireman on a lighter. All were plainly members of crews of vessels. On the other hand, Cassaretakis was assistant cook on board a dredge which was employed in a land filling operation in connection with the construction of a public highway. Bergen was a grain-trimmer on a floating grain elevator, his work being in connection with transfer of grain from one barge to another for purposes of further transportation. The employment of these two latter claimants, therefore, may be deemed incidental to construction and stevedoring operations, respectively, rather than to navigation. In consequence, Cassaretakis and Bergen, although concededly engaged in general maritime employment, were not members of crews of vessels on the navigable waters of the United

States. These two claimants have, moreover, been found to be engaged in employment the whole or greater part of which was transacted within this State.

Two questions of law are raised, (1) whether there is constitutional objection to the application of the statute in question to maritime employments generally, and (2) if there is no such constitutional objection, whether the Congress preempted that part of the field relating to navigation by enacting a statutory prohibition against coverage by the State law, of officers and members of the crew of a vessel on the navigable waters of the United States.

In order to induce the several States to enact unemployment insurance statutes, the Federal government, by the Federal Unemployment Tax Act (Internal Revenue Code, U. S. Code, Tit. 26, §§ 1600, 1601) levied a pay-roll tax upon employers, with certain exceptions, but allowed a credit up to ninety per cent of the Federal pay-roll tax to employers on account of contributions paid for State unemployment insurance. On its part the State of New York has levied a pay-roll tax upon employers measured by a percentage of the pay-roll and assessed upon all employers generally without regard to the nature of employment, with certain exceptions not here material (Labor Law, art. 18, §§ 515, 516). Neither the National nor the State government contributes anything to the fund. The moneys collected by means of this tax are used for the relief of the unemployed, concededly an object within the powers of the State (*Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495).

This tax is an excise based upon the exercise of the privilege of employing individuals. (*Steward Machine Co. v. Davis*, 301 U. S. 548, 578-583; *Carmichael v. Southern Coal & Coke Co. supra; Patton v. Brady*, 184 U. S. 608.) The obligations of the employer under this law are not to his employees but to the State. Likewise, claimants of benefits assert their rights against the State and not against the employer. The employer's duty to pay contributions and the employee's right to receive benefits are independent of each other. The employer must continue to pay the tax although none of his employees ever becomes entitled to benefits through lack of employment; the employee has a

right to receive benefits upon becoming unemployed although his employer has failed to contribute.

A mere statement of this State law demonstrates that it does not modify or attempt to modify, alter or supplement the rights and liabilities of the parties to any maritime contract, nor does it touch remedies enforceable in admiralty. This tax exists independently of the employment out of which it arises. The measure of the tax by the amount of wages paid does not make the tax less independent of the occupation. Conceding that these claimants performed services under a maritime contract of employment, nothing in the challenged statute in any way changes, modifies or affects the reciprocal rights and duties of the employer and employee arising out of the maritime contracts or the remedies enforceable in admiralty. There is a fundamental distinction between statutes which interfere with the rights and obligations of the parties to a maritime contract, as between themselves, and a statute which effects no such interference.

The power to levy such an excise tax and to use the funds thus raised for local purposes is a sovereign power reserved to the States, of which they were not deprived by the Constitution of the United States. In *Carmichael v. Southern Coal & Coke Co.*, Mr. Justice Stone (now chief justice) said: "Taxes * * * may likewise be laid on the exercise of personal rights and privileges. As has been pointed out by the opinion in the *Chas. C. Steward Machine Co.* case, such levies, including taxes on the exercise of the right to employ or to be employed, were known in England and the Colonies before the adoption of the Constitution, and must be taken to be embraced within the wide range of choice of subjects of taxation, which was an attribute of the sovereign power of the States at the time of the adoption of the Constitution, and which was reserved to them by that instrument" (p. 608).

It is contended, however, that the State may not thus exercise its reserved powers of taxation because it involves a conflict with paramount powers vested in the Federal government in two respects; *first*, the State law is alleged to interfere with and burden maritime commerce in its

national and international aspects as to which Congress alone has power to legislate; *second*, the State law is also alleged to contravene the essential purposes of and to work prejudice to characteristic features of the maritime law, and to interfere with its proper harmony and uniformity in its interstate and international relations.

The paramount power of Congress to legislate in the field of maritime law is implied from the grant to the Federal courts in section 2 of article III of the Federal Constitution, of judicial power in all cases involving admiralty and maritime jurisdiction. It is, however, well settled that in the maritime field, just as in the field of interstate commerce generally, the state has power to act in matters of merely local concern, which do not require uniform national legislation. (*Cooley v. Board of Wardens*, 12 How. [U. S.] 299.) One engaged in an interstate business may be lawfully subjected to a state tax upon the instruments employed in that business (*Western Union Telegraph Co. v. Attorney-General*, 125 U. S. 530), and this is so even though such commerce is maritime in nature. (*Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 305.)

In addition, by section 1606, subd. (a) of the Federal Tax Act, the Congress has declared that state unemployment insurance laws may be applied to interstate commerce. And in *Perkins* v. *Pennsylvania*, 314 U. S. 586; affg., 342 Penn. St. 529) the Supreme Court has held that there is no constitutional obstacle under the commerce clause to the application of the Pennsylvania unemployment insurance law to those employed in interstate commerce. This would seem to be a conclusive determination that unemployment among those engaged in interstate commerce in general is a matter of local concern as to which no uniform national legislation is needed and in which field, therefore, the states may constitutionally legislate.

As to the second objection noted above and based upon the limitations upon state legislation stated in *Southern Pacific Co.* v. *Jensen* (244 U. S. 205) it would seem to be a sufficient answer to repeat that the enactment in question is a taxing statute designed to raise funds for a state purpose. It does not, therefore, attempt to alter the contract of employment between master and servant or to change

the rights and remedies enforceable in admiralty as incidental to that relationship. It does not create any new rights or liabilities between the parties. Nothing contained therein would cause a court of admiralty to alter in any respect the body of law which it applies to the cases pending before it.

That a state may, within prescribed limits, enter into the field of maritime law and add to or modify remedies enforceable in admiralty was conceded by Mr. Justice McReynolds in the *Jensen* case. In *Just* v. *Chambers* (312 U. S. 383) a statute of the State of Florida, providing that a cause of action for personal injuries shall survive the death of the tort feasor, was held to be applicable in a court of admiralty to an action against the owner of a vessel on account of injuries occurring on navigable waters within the State boundaries. The State law, it was said, did not offend the criteria of essential purpose and uniformity laid down in the *Jensen* case. If, therefore, the states may, within the prescribed limits, actually add to the remedies under maritime law, *a fortiori*, the legislation in the case at bar may not be held to have over-ridden the limitations set forth in the *Jensen* case.

Respondents point to a line of authorities (*Southern Pacific* v. *Jensen, supra; Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Western Fuel Co.* v. *Garcia*, 257 U. S. 233; *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469) holding workmen's compensation statutes invalid as interfering with the characteristic features and essential uniformity of admiralty law. These cases all rest upon the principle that the workmen's compensation laws set aside the common law rules respecting the rights and liabilities of employer and employee and substituted new rules for determining such rights and liabilities. These statutes become a part of the contract and thereby directly affect the rights and duties between the parties. As was said by this court in *Matter of Doey* v. *Howland Co.* (224 N. Y. 30, 36): "An award under the Workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract. (*Matter of Post* v. *Burger &*

Cohlke, 216 N. Y. 544.) The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for injuries sustained, or if death results, a certain sum to dependents."

A clear distinction between these cases and that of the unemployment insurance law is that the latter does not in any way operate upon the contract of employment or interfere with maritime and admiralty jurisdiction. The payment of an excise tax upon the privilege of employing others can no more be considered an unwarranted intrusion by the states into admiralty jurisdiction than can numerous other state taxes previously upheld; for instance, franchise taxes upon towing companies *(People ex rel. Cornell Steamboat Co.* v. *Sohmer,* 235 U. S. 549); taxation of insurance companies upon the writing of marine insurance policies *(Aetna Ins. Co.* v. *Houston Oil & Transport Co.,* 49 Fed. Rep. [2d] 121); taxes upon shipping *(Transportation Co.* v. *Wheeling,* 99 U. S. 273); and tolls levied upon interstate and foreign shipping using state-improved waterways. (*Sands* v. *Manistee River Improvement Co.,* 123 U. S. 288.)

It follows that there is no constitutional objection to coverage of maritime employments by the Unemployment Insurance Act of New York State.

We are thus brought to the second question, namely, whether by virtue of the provisions of section 1607 (subd. c) (par. 4) of the Internal Revenue Code (U. S. Code, tit. 26) the officers and members of the crew of a vessel on the navigable waters of the United States have been specifically excluded by Congress from coverage by state laws. We may assume that Congress has the constitutional right under the admiralty clause of the Federal Constitution, to exclude maritime employments from coverage by state unemployment insurance.

In other words does the fact that the Federal Act in the case at bar exempts from its operation the officers and crews of vessels on navigable waters prevent the states from covering maritime employment in the unemployment insurance laws which they have enacted?

From the nature of the independent power reserved to the states of taxing for their own support and to promote

the general welfare of their inhabitants, there has been developed the principle that it will not be presumed that Congress intended to exclude the reserved powers of the state by virtue of paramount powers vested in Congress by the Federal Constitution unless an actual conflict exists between Federal and State legislation. In *Savage* v. *Jones* (225 U. S. 501) the court lays down this principle (at p. 533): "But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State."

A comparison of the Federal tax act and our State unemployment insurance act shows that there is no actual conflict between them even when the State act is construed to cover employments expressly exempted under the Federal taxing statute.

The Federal statute, of course, is not an unemployment insurance law. It is a mere taxing statute but contains a provision allowing ninety per cent of contributions exacted thereunder to be credited by employers against contributions paid under certified state systems. This credit arrangement was designed to give the states an incentive to enact their own unemployment insurance laws and to protect those states which enacted such laws against being put at a competitive disadvantage as against other states which might fail to take such action. Congress evidently believed that these objects could be accomplished by taking only certain kinds of employment while exempting other kinds. The states in creating their unemployment systems, on the other hand, had different objectives in view in canvassing the kinds of employment to be covered or excluded under their statutes. Their problem was to decide what types of employment seriously required the protection of an unemployment compensation law and what types could practically be included within such a system. Whatever types of employment the Congress might exclude, the states might exempt wholly different types upon the ground that employees in these categories did not require such protection

or else that it would be impracticable or impolitic to furnish them with such protection. There is, therefore, no necessary similarity as to the types of employment either covered or exempted by the Federal and state statutes respectively.

The legislative history and the judicial interpretation of the Federal statute amply demonstrate that it was not intended thereby to strait-jacket the states in the enactment of their own unemployment insurance laws. (See Senate Report, No. 628, Cal. No. 661, 74th Congress, p. 14; *Steward Machine Co.* v. *Davis, supra,* at pp. 593, 594.) The conclusion is inescapable that Congress intended to leave to the states the widest possible latitude in setting up their unemployment compensation systems both as to the kind and extent of coverage provided. This broad policy may not be overridden by the exemptions contained in section 1607 (subd. c) (par. 4).

One word should be said in conclusion as to the argument advanced that great practical difficulties lie in the way of the states providing benefits for seamen, the nature of whose work may take them into many other states and even into foreign parts. A picture is drawn of the hopeless confusion into which maritime employment may be plunged if a number of states attempted to apply conflicting state statutes to the same employer-employee relationship. The difficulty conjured up would appear to be more imaginary than real and in no event could affect the result arrived at herein. It may be that Congress will in future decide to appropriate the entire marine field to a uniform unemployment insurance system. Such congressional action might effectively oust the states from the field because of the paramount power vested in Congress by section 2 of article III of the Federal Constitution. It is sufficient for the purpose of these appeals, however, to say that no such obstacle stands in the way of state legislation at the present time.

It follows that in the cases of the claimants, Cassaretakis and Bergen, the orders of the Appellate Division should be reversed and the determination of the Unemployment Insurance Appeal Board affirmed; in the cases involving Sheredos, Knowlson, Schein and Smith, the orders of the

Appellate Division and the determination of the Unemployment Insurance Appeal Board should be reversed and the cases remitted to such Appeal Board for proceedings in accordance with this opinion, all with costs in the court and in the Appellate Division.

Lehman, Ch. J., Loughran, Rippey, Lewis, Conway and Desmond, JJ., concur.

Ordered accordingly.

(4674)

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Supreme Court of the United States

OCTOBER TERM, 1942

No. 723

INTERNATIONAL ELEVATING COMPANY,
Appellant,

vs.

FRIEDA S. MILLER, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, AND JOSEPH BERGEN.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF FOR APPELLANT

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Supreme Court of the United States,

OCTOBER TERM, 1942

INTERNATIONAL ELEVATING COMPANY, *Appellant,* *vs.* FRIEDA S. MILLER, AS INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, AND JOSEPH BERGEN.	No. 723

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT.

BRIEF FOR APPELLANT

Opinions Below

The opinion of the New York Court of Appeals is reported in 289 N. Y. 119, sub nom. *Matter of Cassaretakis;* that of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department is reported in 262 App. Div. 654.

Jurisdiction

This appeal was allowed by order (R. 70) of the Chief Judge of the New York Court of Appeals upon application by the appellant (R. 71). Jurisdiction of this Court is sustained by Section 237(a) of the Judicial Code (28 U. S. C. § 344(a)). This Court noted probable jurisdiction, March 8, 1943 (R. 77).

Statement of the Case

This is an appeal from a determination by the Court of Appeals of the State of New York that the unemployment insurance law of New York may constitutionally be applied to employment which is exclusively maritime in character. The Court of Appeals reversed the contrary determination by the Appellate Division of the Supreme Court, Third Judicial Department which in turn had reversed a decision by the New York Unemployment Insurance Appeal Board holding that claimant herein was entitled to benefits under the unemployment insurance law of New York.

Determinations of fact and law in a proceeding for benefits bind an employer, such as appellant, as to its liability for contributions with respect to the employment of the particular claimant and also with respect to all similar employment. N. Y. Labor Law, Section 530.* Though the claimant's right to benefits does not depend on the fact of contribution, the granting of benefits may imply a legal liability on the part of the employer to make contributions.

Facts

Claimant worked for the appellant during 1938 and 1939 as a grain trimmer in connection with its operation of self-propelled floating grain elevators on the navigable waters of the United States engaged in the loading and unloading of grain to and from ocean-going vessels in the harbor of New York (R. 3-4, 23, 33). The particular elevator proceeds to a pier to which a steamship is moored, comes alongside and makes fast; whereupon the vessel, to or from which the transfer is to be made, is brought alongside and made fast to the elevator (R. 19). The leg of the elevator is then dropped into the grain vessel and the grain is elevated from the vessel into the elevator by means of a conveyor belt with buckets attached (R. 16, 17). The grain then passes through a pipe into the hold of the receiving vessel (R. 32). Grain trimmers may work in the

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* Printed in Appendix, page 22.

hold of the discharging or receiving vessel or on the elevator itself (R. 18).

The duty of the trimmers in the discharging vessel is to operate the steam shovels, powered from the elevator, which push the grain to the elevator leg (R. 16, 17, 18, 26). Other trimmers see to the proper trimming of the grain cargo in the hold of the receiving vessel. Trimmers may also handle lines whereby the elevator and the grain vessel or barge are brought alongside and made fast (R. 32, 36); they habitually go out with the same elevator (R. 20, 34).

Claimant never worked ashore (R. 24, 35). The Appeal Board found "that the grain elevator on which the claimant performed his services was a vessel * * * and that the waters on which said services were performed were navigable waters of the United States" (R. 6).

Some of the piers at which the employer's elevators are used are located in New York. Others are in New Jersey. Claimant performed services adjacent to both states during the period involved in this cause (R. 33, 50).

Statutory Background

Title IX of the Federal Social Security Act (now the Unemployment Taxing Act), the taxing provisions of which became effective January 1, 1936, was enacted August 14, 1935 as an inducement to the states to provide state systems of unemployment insurance.

Section 907 (c) (3) of Title IX (now Section 1607 (c) (4) of the Internal Revenue Code) excluded from employment covered by the act services performed by an officer or a member of the crew of a vessel on the navigable waters of the United States.* There is reason to suppose that this

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* A comparable exclusion was made in Title VIII of the Social Security Act as it was originally enacted (Sec. 811 (b) (5)). On amendment of the Act in August, 1939 the maritime exclusion was dropped in connection with the federally administered old age benefit system (Title VIII) but continued in connection with the state administered unemployment insurance systems.

exclusion was occasioned in part by the anticipated administrative difficulties in connection with the application of unemployment insurance legislation in the maritime field and, in part, by considerations as to the limited extent of state jurisdiction under the admiralty clause of the Constitution of the United States, Article III, Section 2. In a report of the Social Security Board, Document No. 110, Page 16, 76th Congress, First Session, House of Representatives, appears the following:

> "Under the Constitution it is impossible to confer upon the States jurisdiction over maritime employment, with the possible exception of that incidental to employment on land. Therefore, in order to afford unemployment compensation protection to seamen it would be necessary to pass a Federal Act."

On March 10 last the National Resources Planning Board published a report which recommended extension of unemployment compensation as follows:

> "(a) Coverage should be extended to embrace seamen* and employees of non-profit corporations and firms employing one worker or more." New York Herald Tribune Thursday March 11, 1943.

It is evident, however, that whatever its intention may have been, Congress did not enact an exclusion coextensive with the assumed jurisdictional barrier. Officers and members of the crew are only a section of a larger category of maritime employees as Congress recognized in the Federal Longshoremen's and Harbor Workers' Act, applicable, by its terms, to maritime workers other than "a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." (33 U. S. C. Section 903 (a) (1).)

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* The scope of the term, "seamen" has been defined by the decisions of this Court. (See *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50 (1926); and *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52 (1914).)

All of the forty-eight states, together with the territories of Alaska and Hawaii and the District of Columbia, reacted to the inducement of Title IX of the Federal Social Security Act, and by July 1, 1937, had enacted unemployment insurance laws. In forty-six of these original enactments services as an officer or member of the crew were excluded from covered employment. Louisiana, however, added to the Federal exclusion the words "customarily operating between ports in this State and ports outside this State". California excluded:

> "Maritime services as to which this State is prohibited by the Constitution and laws of the United States of America from requiring contributions of employers or their workers with respect to wages as provided in this act".

This exclusion was artfully tailored to fit the exact extent of the jurisdictional limitation under the Constitution. It has been taken over by Arkansas, Minnesota and Oklahoma.

New York State and a few others failed to make any maritime exemption. (See, Commerce Clearing House, Unemployment Insurance Service, ¶¶933A, 1368.)

General Background

In January 1936 there appeared a published opinion* of the Attorney General of the State of New York (Report of Attorney General (1936), Page 268) holding that the doctrine of *Southern Pacific Company* v. *Jensen*, 244 U. S. 205 (1917) applied to unemployment insurance. Maritime employers generally felt safe in assuming that maritime services, except when performed in connection with services ashore, were not within the scope of the unemployment insurance law of the State of New York.

In April 1936 the employer in this cause received a letter from the New York State Division of Placement and Unemployment Insurance which, in conjunction with the

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* Printed in Appendix, pages 23-27.

Attorney General's published opinion, was taken to exempt their elevator employees, no part of whose services is performed ashore (R. 42, 43).

In January 1937 this employer, after several exchanges of letters between it and the Treasury Department, received a communication from the latter to the effect that its elevator employees were not covered by Title IX of the Federal Social Security Act (Employer's Exhibit No. 1, R. 40, 50, 51).

In May of 1937 the union with which claimant was affiliated was likewise informed by the Treasury Department that grain trimmers (such as claimant) were regarded by that department as "officers and members of the crew, etc."* (Employer's Exhibit No. 2, R. 41, 51, 52).

Four and one-half years after the appearance of the Attorney General's published opinion, the present proceeding was begun in the course of which the Industrial Commissioner of the State of New York betrayed for the first time to this employer, non-concurrence with the opinion of the Attorney General.

The Decisions Below

The New York Unemployment Insurance Appeal Board upheld the referee of the industrial commissioner, determining that claimant was not an officer or member of a crew of a vessel on the navigable waters of the United States and accordingly that the unemployment insurance law was applicable to his employment.

The Appellate Division, unanimously reversing the decision of the Unemployment Insurance Appeal Board, held

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* In March of 1942 the employer was advised by the Treasury Department that the matter of the status of grain trimmers such as claimant had been reconsidered and that the early rulings that grain trimmers were officers and members of the crew within the exclusion were thereby revoked. This revocation was not given retroactive effect, however.

that the unemployment insurance law could not be constitutionally applied to employment exclusively maritime in character as claimant's employment was conceded to be by the Appeal Board. The Appellate Division referred to the fact that claimant was a member of the crew of a vessel on the navigable waters of the United States as an additional ground for reversal.

The Court of Appeals, unanimously reversing the Appellate Division, held that the unemployment insurance law was applicable to maritime employment whether or not the employment was that of an officer or member of the crew of a vessel on the navigable waters of the United States. The Court of Appeals also sustained the Appeal Board's determination, with respect to claimant, that his services were not performed as an officer or member of the crew of a vessel on the navigable waters of the United States, thus rejecting the additional ground for reversal referred to by the Appellate Division.

Specification of Errors to Be Urged

The appellant has assigned and now urges the following error:

The Court of Appeals erred in holding that the unemployment insurance law, New York Labor Law, Article 18 (Consolidated Laws, Chapter 31), when applied to workers, such as claimant, engaged solely in maritime employment, is valid and does not violate the provisions of Article III, Section 2 of the Constitution of the United States.*

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* The appellant has also assigned errors as follows:

2. The Court of Appeals erred in holding that said law, when applied to workers, such as claimant, engaged solely in maritime employment, constituting services as an officer or member of the crew of a vessel upon the navigable waters of the United States under applicable rulings of federal administrative authorities, and therefore outside the scope of the Federal Unemployment Tax Act, Section 1607 (c)

(Footnote continued on next page)

Summary of Argument

1. The power of the United States within the maritime field is exclusive.

Appellant relies on decisions by this Court dealing with the jurisdiction of states to apply their workmen's compensation laws in the maritime field. It shall be argued,

> First, that the constitutional doctrine established in the workmen's compensation cases should be applied in the field of unemployment insurance for the same essential reason assigned for its application

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(4), is valid and does not violate the provisions of Article III, Section 2 of the Constitution of the United States.

3. The Court of Appeals erred in refusing to review the determination of the Referee and the Unemployment Insurance Appeal Board that this claimant was not an officer or member of the crew of a vessel upon the navigable waters of the United States, notwithstanding a determination to the contrary by the federal administrative authorities.

4. The Court of Appeals erred in holding that section 534 of said law, providing that determinations of fact by the said Appeal Board shall be final, when applied to a determination of such a *jurisdictional* fact as whether or not claimant was performing service as an officer or member of the crew of a vessel on the navigable waters of the United States, is valid and does not violate Article III, Section 2 of the Constitution of the United States.

5. The Court of Appeals erred in failing to hold, as a matter of law, that claimant was a member of the crew of a vessel on the navigable waters of the United States.

Under the view we now take the errors assigned designated "2" through "5" need not be urged. Although implicit in the language of the opinion below, they were not necessary to the result since the court held that the state has the power asserted regardless of whether or not the employment comes within the federal exemption. Analysis of the decision indicates that although the court might have committed these errors it did not in fact do so. Our argument will therefore be confined to the error actually committed.

to workmen's compensation, the practical utility of the application of this doctrine to the maritime employment being apparent in this very case;

Second, that the application of the unemployment insurance law to sustain the claim herein may not be upheld as an imposition of an excise tax on employment;

Third, that there is no adequate distinction between unemployment insurance and workmen's compensation to justify the departure in the case at bar from the constitutional doctrine established in the workmen's compensation cases.

II. Whatever the power of Congress may be to delegate the jurisdiction asserted by the appellee, the fact of delegation is not present in this case.

POINT I

The power of the United States within the maritime field is exclusive.

Workmen's Compensation Cases

In the beginnings of workmen's compensation, this Court held that states could not administer their workmen's compensation laws in the maritime field even though the Judicial Code saved to suitors in all cases "the right of a common law remedy, where the common law is competent to give it" (Section 9, Judicial Code of 1789, 1 Stat. 76, 77; see, 28 U. S. C. §371).

Southern Pacific Co. v. *Jensen,* 244 U. S. 205 (1917).

Congress thereafter amended the Judicial Code to save "to claimants the rights and remedies under the workmen's compensation law of any State" (Act of October 6, 1917, 40 Stat. 395; see, 28 U. S. C. §371).

This amendment, however, proved abortive.

Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149 (1920).

Again, in 1922, Congress further amended the Judicial Code to save to claimants "other than the master and members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State" (Act of June 10, 1922, c. 216, 42 Stat. 634; see, 28 U. S. C. §§41, 371). This amendment likewise proved abortive.

Washington v. *Dawson & Co.*, 264 U. S. 219 (1924).

The doctrine established by the *Jensen* case and extended in *Knickerbocker Ice Co.* v. *Stewart* and *Washington* v. *Dawson & Co.* has become such an integral part of the law that its repudiation at present would create more difficulties than it would resolve.

See,

Davis v. *Department of Labor*, 317 U. S. 249 (1942).

Mr. Justice Frankfurter pointed out in the latter decision (at p. 259) that:

> "Federal and state enactments have so accommodated themselves to the complexity and confusion introduced by the *Jensen* rulings that the resources of adjudication can no longer bring relief from the difficulties which the judicial process itself brought into being."

Accommodation to the *Jensen* ruling by legislatures and administrative authorities is a *fact* to be reckoned with in this cause. Adherence to the *Jensen* ruling is thus required "to avoid unfortunate practical results from a change".

See,

Helvering v. *Griffiths*, No. 467, October Term, 1942, decided March 1, 1943.

1.

The Jensen doctrine should be applied to unemployment insurance for the same reason assigned for its application to workmen's compensation.

Whatever difficulties may have resulted from the ruling in the *Jensen* case, it had as its object the relief of maritime commerce from "unnecessary burdens and disadvantages incident to discordant legislation" and the establishment of "harmonious and uniform rules applicable throughout every part of the Union". *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 164. This justification for the *Jensen* doctrine is present in the instant case. Appellant confronts real difficulties and substantial embarrassments in view of the fact that its employees, including claimant, performed substantial services within the territorial jurisdiction of both New York and New Jersey.*

The decision of the Court of Appeals below held that *all* of claimant's employment constituted New York employment notwithstanding the possibility that New Jersey may claim that the services performed within its territorial jurisdiction constitute New Jersey employment. This possibility** will be substantiated by a comparison of the New York and New Jersey statutes as they existed during the period from January 1, 1938 to June 3, 1939:

New York	*New Jersey*
"As used in this article:	"The term 'employment' shall include an individual's entire service performed within or both within and without this State if:
1. 'Employment' except where the context shows otherwise, means any employment under any contract of hire, express or implied, written or oral, including all	(A) The service is *localized* in this State; or

* As to territorial jurisdiction of New York and New Jersey see *Clarke* v. *Ackerman*, 243 App. Div. 446-448.

** The possibility which we note above has become an actuality. The appellant now stands liable for contributions to both New York and New Jersey with respect to the same employment.

contracts entered into by helpers, and assistants of employees, whether paid by employer or employee, if employed with the knowledge actual or constructive of the employer, *in which all or the greater part of the work* is to be performed within this state." (Laws of 1936, chapter 117; compare Laws of 1939, chapter 662; Laws of 1941, chapter 169.) (italics supplied)

(B) The service is not localized in any state but some of the service is performed in this state and (i) *the base of operations*, or, if there is no base of operation, then the place from which such service is directed or controlled, is in this State; * * *" (43:21-19 (i) (2)). (italics supplied)

Under these statutes claimant's employment might come within the jurisdiction of the State of New York as employment "in which all or the greater part of the work is to be performed within this State" (New York Labor Law, Sec. 502; Laws of 1936, Chap. 117), as well as within the jurisdiction of the State of New Jersey as employment in which "some of the service is performed in this State and (i) the base of operations * * * is in this State" (New Jersey Unemployment Compensation Law,* 43:21-19).

The existence of this difficulty shows emphatically that there is distinct utility to the constitutional doctrine on

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* Since June 3, 1939 Section 502 of the New York Labor Law has been amended on various occasions with the result that after June 3, 1939 it has contained in substance the same provisions as are contained in the New Jersey law set forth in the text respecting the allocation of work performed in two or more states. These amendments, though they resolve theoretical conflicts between the statutes themselves, do not solve actual conflicts in connection with their application. It is obvious that any determination as to the localization of the employment or as to the base of operations or place of direction or control will present a close and difficult question of fact, inconsistent answers to which by the respective administrative authorities will be inescapable. Present definitions of employment are printed in the Appendix, pages 19-21.

which the appellant relies and that the application of the *Jensen* doctrine to unemployment insurance will achieve the constitutional object, envisaged by the Court in the *Knickerbocker Ice Co.* case, "to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation."

When the learned Court below declares that "the difficulty conjured up would appear to be more imaginary than real", it is closing its eyes to real and present problems, the existence of which is generally recognized. See C. C. H. Unemployment Insurance Service, ¶¶ 1380-1384. The Court also fails to recognize that the two State statutes in effect during the greater part of the period involved in this case are in utter conflict.

The learned Court below, after minimizing the lack of harmony between the two State statutes, continues: "in no event could (the difficulty) affect the result arrived at herein." We submit that this statement is clear evidence that the learned Court below, in the guise of distinguishing the workmen's compensation cases, has actually repudiated their doctrine. The Court beclares that lack of uniformity and lack of harmony which, under the decisions of this Court, are the sole criteria of the application of the *Jensen* principle, are not material in a case involving the application of a state law in the maritime field.

2.

The allowance of a claim for benefits by a person whose services were exclusively maritime in character cannot be sustained as the imposition of an excise tax on the privilege of employment.

The Court of Appeals below sought to sustain the allowance of the claim here by asserting the validity of the application of a state excise tax in the maritime field. This Court cannot accept any such basis for the result reached by the Court below unless it is prepared to overrule its decision in *Washington* v. *Dawson & Co.*, 264 U. S. 219 (1924).

In the latter case the employer was disputing the right of the State of Washington to require contributions to the state compensation fund payable to the fund in the same manner in which unemployment insurance contributions are payable, based on a percentage of the employer's payroll. That such contributions were in the nature of a tax was recognized by Mr. Justice Brandeis in his dissenting opinion, p. 231; see also, *Mountain Timber Co.* v. *Washington*, 243 U. S. 219, 237 (1917).

The *Dawson* case was concerned only with the contributions aspect of the Washington workmen's compensation law and the right of the State to collect such contributions was denied.

3.

There is no adequate distinction between unemployment insurance and workmen's compensation to justify departure in the case at bar from the Jensen doctrine.

We cannot repeat too often what we have already pointed out, namely, that the relief of maritime commerce from the burdens of discordant legislation, if a legitimate constitutional objective in the field of workmen's compensation, is an equally legitimate constitutional objective in the field of unemployment insurance.

Due to the ambulatory character of maritime employment, the application of state unemployment insurance laws in the maritime field must necessarily result in confusion: employers may be required to make contributions into the funds of various states with respect to the same employment and employees may be uncertain as to the existence and the extent of their rights under the unemployment insurance laws of the various states in which they may perform services.

The Court below, ignoring the presence in the instant case of this constitutional objective, seized on the distinction that although workmen's compensation laws superseded the com-

mon law and actually destroyed common law rights and remedies, unemployment insurance legislation does no such thing.

Again we say that acceptance by this Court of the distinction urged by the Court of Appeals will require the overruling of *Washington* v. *Dawson & Co.* where this Court was concerned only with the contributions aspect of the Washington workmen's compensation law. Arguments as to the supersedure of the common law and the destruction of common law rights and remedies were irrelevant to the issue which was presented in that case.

Furthermore, the distinction which forms the basis of the decision of the learned Court below has been stigmatized by this Court as "a subtlety which • • • does not merit judicial adoption".

Just v. *Chambers,* 312 U. S. 383, 391 (1941).

Modification as distinguished from supplement of maritime law is no criterion of invalidity of state legislation within the maritime field. "Either supplement or modification is permissible in accordance with the accepted criterion • • •" 312 U. S. 383, 392. The accepted criterion is harmony, the absence of which is clearly discerned in this very case.

The learned Court below makes the assertion that the unemployment insurance law does not operate upon the contract of employment. This categorical assertion is inconsistent with the fact that the unemployment insurance law as an incident to the contract of hire imposes certain obligations on employers and creates certain rights in favor of employees. Any attempt to differentiate between the unemployment insurance law which supplements the contract of hire and workmen's compensation laws which modify existing rights and obligations created by the contract of hire should, for the reasons we have already discussed, be promptly rejected by this Court as an acceptable criterion of the validity of the application of unemployment insurance legislation in the maritime field.

POINT II

Whether or not Congress has the power to do so, it has not delegated to the states the jurisdiction asserted in this case.

–1–

Had Congress amended the Judicial Code "saving to claimants the rights and remedies under the unemployment compensation law of any state", such an express delegation could not have conferred the jurisdiction which is now asserted.

Knickerbocker Ice Co. v. *Stewart,* 253 U. S. 194 (1919);
Washington v. *Dawson & Co.,* 264 U. S. 219 (1923).

There has been no express delegation here. Thus the appellee is asking this Court to give greater force to the silence of Congress than has heretofore been given to its articulate voice.

Legislative history substantiates congressional recognition of the constitutional principle that the jurisdiction here asserted is not such as may be conferred by an implied license from the Federal legislature.*

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* The committee reports on the Longshoremen and Harbor Workers Act are a significant part of the legislative history: "If longshoremen could avail themselves of the benefits of State Compensation Laws, there would be no occasion for this legislation * * *". (Sen. Rep. No. 973, 69th Cong., 1st Sess., p. 16). "The bill as amended therefore will enable Congress to discharge its obligation to the maritime workers placed under their jurisdiction by the Constitution of the United States by providing for them a law whereby they may receive the benefits of workmen's compensation * * *." (House Rep. No. 1767, 69th Cong., 2d Sess., p. 20.)

Bills have been introduced in Congress to provide a system of unemployment insurance for the maritime industry.*

These bills recite that under present conditions the benefits of unemployment insurance protection are not available to maritime employees.

Should legislation of this character be enacted serious difficulties are anticipated in addition to those difficulties which now exist because of divergent state laws or possible divergent applications of identical state laws.

Discordant administrative determinations respecting the status of maritime employees are inevitable, depending upon the pressures in the particular proceeding. Particular services may be found to be New York employment; they may be found to be New Jersey employment. They are susceptible of classification as services by an officer or member of a crew; they are susceptible of a contrary classification.

Benefits** and contributions*** by employers will vary as between particular state laws and as between state laws and possible federal legislation. Administrative authorities naturally will wish to provide benefits to claimants where their need is great and it must be anticipated that they may do so without too much regard for jurisdictional niceties. Nor would we have a quarrel with such an attitude were it not for the fact that it may mean serious financial burdens to the employer whose liability for contributions is thus determined. The employer has a right to know in advance how much to pay and to whom. Appellant, at the present time, is embarrassed by the question involving possible

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* See H. R. 560; H. R. 5446.

** e. g., employees now prefer classification as railroad employees to secure the higher benefits of the railroad retirement system.

*** New Jersey requires an employee's contribution, New York requires none.

liabilities to New York and New Jersey. If federal legislation in the maritime field is enacted and the decision of the Court of Appeals of New York is permitted to stand, its embarrassment will be further increased.

Conclusion

The differences between unemployment insurance and workmen's compensation are not such as to render inapplicable here the doctrine of *Southern Pacific Co.*, v. *Jensen*. A reappraisal of the principle of that case and its repudiation at this time would have "unfortunate practical results". The desirability of providing universal unemployment relief requires the application of the *Jensen* doctrine since this end can be achieved, and its achievement is actually projected, by appropriate federal action consonant with this doctrine.

The order of the Court of Appeals should be reversed

Dated, Brooklyn, N. Y., April 12, 1943.

Respectfully submitted,

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APPENDIX

Statutory Provisions

I

Present Definitions of Employment

New York

§ 502. Definitions as used in this article:

1. "Employment," except where the context shows otherwise, means any employment under any contract of hire, express or implied, written or oral, including all contracts entered into by helpers and assistants of employees, whether paid by employer or employee, if employed with the knowledge actual or constructive of the employer.

(1) The term "employment" shall include an individual's entire service, performed within or both within and without this state if: (a) the service is localized in this state; or (b) the service is not localized in any state but some of the service is performed in this state, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this state; or (ii) the base of operations or place from which such

New Jersey

Section 43:21-19. As used in this chapter, unless the context clearly requires otherwise:

* * * * *

(i) (1) "Employment" means service, including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied.

(2) The term "employment" shall include an individual's entire service, performed within or both within and without this State if:

(A) The service is localized in this State; or

(B) The service is not localized in any State but some of the service is performed in this State and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this State; or (ii) the base of operations or place from which such service is directed or con-

service is directed or controlled is not any state in which some part of the service is performed, but the individual's residence is in this state.

(2) Services performed within this state but not covered under paragraph (1) of this subdivision shall be deemed to be employment subject to this article if contributions are not required and paid with respect to such services under an unemployment compensation law of any other state or the federal government.

(3) Services not covered under paragraph (1) of this subdivision and performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the federal government, shall be deemed to be employment subject to this article if the individual performing such services is a resident of this state and the commissioner approves the election of the employer for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this article.

trolled is not in any State in which some part of the service is performed, but the individual's residence is in this State.

* * * * *

* * * * *

(4) Services not covered under paragraph (2) of this subsection, and performed entirely without this State, with respect to no part of which contributions are required and paid under an unemployment compensation law or any other State or of the Federal Government, shall be deemed to be employment subject to this chapter if the individual performing such services is a resident of this State and the commission approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this chapter; *provided*, written objections on the part of a substantial proportion of such individuals affected are not presented to the commission within ten days following the filing of such election.

(5) Service shall be deemed to be localized within a State if

(4) Service shall be deemed to be localized within the state if

(a) the service is performed entirely within the state; or (b) the service, performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state, for example, is temporary or transitory in nature or consists of isolated transactions. § 502, 1 of Chapter 31 of the Consolidated Laws of New York.

(This section was amended by L. 1941, c. 33, § 7, eff. Feb. 27, 1941; L. 1941, c. 169, § 1, eff. March 27, 1941; L. 1941, c. 669, § 1, eff. April 22, 1941; L. 1942, c. 223, § 2, eff. March 29, 1942; L. 1942, c. 402, eff. April 11, 1942. L. 1941, c. 33, consolidated into a single subd. 1, two separate amendments thereof by L. 1940, cc. 217 and 799. L. 1941, c. 169, omitted "in which all or the greater part of the work is to be performed within this state", from end of first paragraph.)

(A) the service is performed entirely within such State; or

(B) the service is performed both within and without such State, but the service performed without such State is incidental to the individual's service within the State, for example, is temporary or transitory in nature or consists of isolated transactions.

• • • • •

(7) The term "employment" shall not include:

(A) • • • • •

(B) • • • • •

(C) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;

• • • • •

(§ 19, Chap. 21, Tit. 43 of the Revised Statutes of the State of New Jersey.)

II

Section 530 of New York Labor Law

(Section 530 of Chapter 31 of the Consolidated Laws)

Subdivision 2 as amended by the Laws of 1940, Chapter 426, effective April 12, 1940:

"§ 530. *Hearings on disputed claims for benefits.*

1. • • • • •

2. When the initial determination of a claim for benefits, upon which a hearing has been requested pursuant to the provisions of this section, involves the question whether any person is or was an employer within the meaning of and subject to this article and is or was liable for the payment of the contributions imposed upon employers by this article, or the question whether an employer, as defined by this article, has fully complied with the obligations imposed upon employers by this article, written notice of the hearing shall be given to such person or employer, either personally or by mail, and thereupon he shall be deemed a party to this proceeding, entitled to be heard. Upon such notice having been given, the referee may then decide such question or questions and any other issue related thereto, and his decision shall not be deemed limited in its effect to the immediate employee making the claim for benefits, but shall be deemed a general determination of such questions with respect to all those employed by such person or employer for all the purposes of this article, and such decision shall be conclusive and binding upon him, subject, however, to the right of appeal hereinafter provided. Added L. 1935, c. 662, § 23; amended L. 1940, c. 426, eff. April 12, 1940."

Opinion of New York Attorney General

(1936 REPORT OF ATTORNEY GENERAL)

Page 268.

LABOR LAW, ARTICLE 18, UNEMPLOYMENT INSURANCE FUND—OFFICERS AND MEMBERS OF CREWS OF VESSELS DOCUMENTED UNDER THE LAWS OF THE UNITED STATES; OPERATORS OF TUG BOATS, FERRY BOATS AND THEIR EMPLOYEES WORKING IN NAVIGABLE WATERS SOLELY WITHIN THE GEOGRAPHICAL LIMITS OF NEW YORK STATE.

The Unemployment Insurance Fund Act Does Not Apply to the Owners of Vessels Documented Under the Laws of the United States, or to Owners of Tug Boats, Ferry Boats, etc., Operating Exclusively in Navigable Waters Within the Geographical Limits of the State.

This will acknowledge receipt of and answer your memorandum of December 5, 1935, in which you ask the following:

(a) May the New York State law extend its jurisdiction to officers and members of crews of vessels documented under the laws of the United States?

(b) May the New York State law extend its jurisdiction to operators of tug boats, ferry-boats, etc., and their employees working in navigable waters solely within the geographical limits of New York State?

The admiralty or maritime jurisdiction of the United States covers navigable waters, craft capable of and designed for navigation of such waters and the execution of contracts pertaining to such waters and craft. Waters which form a continued highway for interstate or international commerce are navigable waters. *The Monticello,* 20 Wall. (U. S.) 430. They include, as concerns New York,

the Hudson, St. Lawrence and Niagara rivers, Lake Erie, and Ontario and the streams and lakes within the State that are commercially contributory to them, including the canals. These are all within the admiralty jurisdiction of the United States. This would seem to include all navigable waters within the geographical limits of New York State.

The question of State regulation as applied to maritime jurisdiction was raised in and determined by the United States Supreme Court in *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 114, and later in *State of Washington* v. *Dawson,* and *Industrial Accident Commission of California* v. *Rolph Co.,* 264 U. S. 219. In both of these cases, the court held that the Workmen's Compensation Law of the State of New York could not be given maritime jurisdiction. Mr. Justice McReynolds, delivering the opinion of the court in the *Knickerbocker Ice Co.* case, stated in part:

> "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.
>
> "Since the beginning Federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states—not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago:

> "'That we have a maritime law of our own, operative throughout the United States, cannot be doubted. * * * One thing, however, is unquestionable; the Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' *The Lottawanna*, 21 Wall. 558, 574, 575 (22 L. Ed. 654)."

The power of Congress to legislate in respect to admiralty and maritime matters was implicitly vested by the constitutional grant of such jurisdiction to the Federal judiciary. *Ex parte Garnett*, 141 U. S. 1; *P. & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578; *So. Pacific Co.* v. *Jensen*, 244 U. S. 205; *The Belfast*, 7 Wall. 624. Whatever stream or body of water is navigable in fact is likewise navigable in contemplation of law. *The Daniel Ball*, 10 Wall. 557; *The Monticello*, 20 Wall. 430; *Economy Light and Power Co.* v. *United States*, 256 U. S. 113.

The maritime jurisdiction is separate and distinct from the power of Congress to regulate commerce upon the navigable waters within its territorial jurisdiction. *The Lottawanna*, 21 Wall. 558.

In the case of the *Daniel Ball*, the particular legislation was justified on the ground that the boat was plying a navigable water of the United States and that it was also engaged in interstate commerce.

In *Ex parte Garnett*, the Court said in reference to the validity of a law of Congress limiting the liability of shipowners:

> "It is unnecessary to invoke the power given to Congress to regulate commerce among the several

> states in order to find authority to pass the law in question. The act was passed in amendment of the maritime law of the country and the power to do so is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but in maritime matters it extends to all matters and places to which the maritime law extends."

In *Washington* v. *Dawson & Company,* Mr. Justice McReynolds writing the opinion, in part stated:

> "If New York can subject foreign ships coming into her ports to such obligations as those imposed by her compensation statute, other states may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the states and with foreign countries would be seriously hampered and impeded."

We note that the Federal Social Security Act, Section 811-b, now exempts from the definition of employment "Service performed as an officer or member of the crew of a vessel documented under the laws of the United States or of any foreign country." The Federal Social Security Act, Section 906, further provides that "No person required under a state law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate commerce or that the state law does not distinguish between employees in interstate commerce and those engaged in intrastate commerce."

The New York State Law, however, is silent as to admiralty employment and there being no specific exemption, the State law provisions seem to be all-embracing. There being no exemption, at first blush it would appear that officers and members of crews should be included in our

State law. The decisions of the United States Supreme Court in the *Knickerbocker* and *Washington* cases seem to hold such an inclusion, however, as unconstitutional and in contravention of federal statute.

Dated: January 27, 1936.

Very truly yours,

JOHN J. BENNETT, JR.,
Attorney-General.

DEPARTMENT OF LABOR.

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Supreme Court of the United States

OCTOBER TERM, 1942
No. 723

INTERNATIONAL ELEVATING COMPANY,
Appellant,

against

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and JOSEPH BERGEN.

REPLY BRIEF FOR INTERNATIONAL ELEVATING COMPANY

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CASE CITED

Matter of International Elevating Company, New Jersey Unemployment Compensation Commission, Docket No. 353, decided December 22, 1942 1

Supreme Court of the United States

OCTOBER TERM, 1942

No. 723

INTERNATIONAL ELEVATING COMPANY,
Appellant,

against

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and JOSEPH BERGEN.

REPLY BRIEF FOR INTERNATIONAL ELEVATING COMPANY

I

Replying to the Brief for the United States

The Solicitor General of the United States argues that the threat of double liability for New York and New Jersey taxes, referred to in our main brief, "is more theoretical than real"* (Brief for the United States, pages 27-31).

A recent decision by a referee of the New Jersey Unemployment Compensation Commission, rendered December 22, 1942, annexed as Appendix A to this reply, proves that appellant's fears are more real than theoretical.

> *Matter of International Elevating Company,* New Jersey Unemployment Compensation Commission, Docket No. 353, decided December 22, 1942.

By this decision, which affects the status of elevator employees of International Elevating Company under the

---

* The Appellee also suggests that the appellant imagines the possibility of duplication of coverage (Brief for Appellee in No. 783, p. 40).

New Jersey unemployment compensation law, New Jersey may tax the same employment which the State of New York may tax under the decision of the Court of Appeals.

As matters now stand there is an actual conflict between the decision of the Court of Appeals and the existing New Jersey administrative policy. In the event of an affirmance by this Court it is far from clear whether any forum exists in which the conflict may be resolved.

The situation presented gives point to the thesis of the workmen's compensation cases that maritime commerce should not be subject to the burdens of discordant legislation.

II

Replying to the Brief for the Industrial Commissioner of the State of New York.

1.

Appellee states (Brief in No. 723, p. 4):

> "Appellant has conceded that the greater part of the work performed by Bergen in 1938 and 1939, prior to June 3, 1939, was in the State of New York, and that the base of operations after June 3, 1939, was in the State of New York (R. 5)."

The above concession has been repeatedly attributed to this appellant without any foundation in the record. The statement involves legal conclusions which the appellant must continue to dispute (R. pp. 27, 28, 33). The facts found on pages 49 and 50 of the record do not support the concessions which the appellee claims.

2.

Appellee states (Brief in No. 723, pp. 5, 6):

> "No question of inequity exists by reason of the Court of Appeals' reversal of the Attorney General's 1936 opinion, because the legislature has pro-

vided that no taxes shall be collected with respect to wages paid prior to January 1, 1942 to officers or members of crews of vessels (N. Y. Laws 1943, c. 454). The claimant's right to unemployment benefits, which gave rise to this proceeding, has not been affected, however."

This appellant is happy to accept the appellee's assurance that the legislature has taken steps to cure the inequity which, but for the legislation to which the appellee refers, admittedly exists*; but it does not afford this appellant relief from the presently existing conflict between New York and New Jersey with respect to its elevator employees.

Dated, Brooklyn, N. Y., April 30, 1943.

Respectfully submitted,

ARTHUR E. GODDARD,
Counsel for Appellant,
177 Montague Street,
Brooklyn, N. Y.

JULES HABERMAN,
ROBERT B. LISLE,
Of Counsel.

---

* It is noted, however, that the legislation by its terms refers to wages paid to officers or members of crews of vessels. Cf. The Attorney General's brief, Point V, in which it is argued that claimant was not a member of a crew.

Appendix A

24864

File No. 26433
Date December 22, 1942

STATE OF NEW JERSEY

UNEMPLOYMENT COMPENSATION COMMISSION

DOCKET No. 353

IN THE MATTER
of
INTERNATIONAL ELEVATING COMPANY
2 BROADWAY
NEW YORK CITY
Petitioner

Decision

This matter was referred and a hearing conducted in accordance with the rules promulgated under Regulation 10 of the Unemployment Compensation Commission of New Jersey.

The undersigned has considered the record and testimony and makes the following:

FINDING OF FACTS:

The International Elevating Co. (hereinafter referred to as the company), owns and operates a fleet of floating grain elevators which are used for the purpose of loading and unloading grain to and from vessels. They are documented with the United States Customs Office at New York.

Usually on board are the following: a captain, engineer, fireman, deck hand, weigher, millwright, superintendent and a gang of trimmers. The company secured the services of all through a union, with one exception—the superintendent. The union has a closed shop contract with the company. The elevator is propelled under its own power to the scene of operations. The captain, engineer, fireman and deckhand perform services while the vessel is in navigation. Upon arrival at the scene of operations, these individuals assist in the loading and unloading of the grain. In fact, they spend a greater part of their time doing this. The captain acts as an extra weigher, the engineer supplies the necessary power for the shovels and "legs" which are used to load and unload the grain. The deckhand assists in setting the delivery pipe and shifting the grain in the hold of the vessels. The fireman keeps the fire going in the boilers. The millwright attends to the machinery and keeps it in operation. The superintendent directs the loading and unloading of the grain and is in complete authority over all persons on board during this operation. The weighers determine the amount of grain moved according to weight. The trimmers manipulate the leg or funnel through which the grain passes. The superintendent, weighers, and trimmers confine their services to the loading and unloading of the grain. There are no sleeping or restaurant facilities on board. At the end of the day, they usually leave the boat and board it in the morning. They do not sign articles as members of a crew. These individuals board or leave the elevators either in New York or New Jersey, and reside in either state. The elevators are tied up to a dock while not in use, which is located in Jersey City, New Jersey. The main office of the company is in New York. It was admitted that services were performed by these individuals in the State of New Jersey during the calendar year 1936. It was also admitted that if the trimmers were determined to be in "employment", the company would have the status of an employer during the calendar year 1936.

The following points are raised: 1. The services performed by these individuals constitute New York employment. 2. These individuals are officers and members of a crew. 3. If their services are within the provisions of the Unemployment Compensation Law of New Jersey, it is in violation of the Constitution of the United States.

Sections 19(i)(2) and (3) and (7)(C) of the New Jersey Unemployment Compensation Law provide as follows:

> Section 19(i)(2)
> "The term 'employment' shall include an individual's entire service, performed within or both within and without this State if:
>
> (A) The service is localized in this State; or
>
> (B) The service is not localized in any State but some of the service is performed in this State, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this State; or (ii) the base of operations or place from which such service is directed or controlled is not in any State in which some part of the service is performed, but the individual's residence is in this State."
>
> Section 19(i)(3)
> "Services performed within this State but not covered under paragraph (2) of this subsection shall be deemed to be employment subject to this chapter if contributions are not required and paid with respect to such services under an unemployment compensation law of any other State or of the Federal Government."
>
> Section 19(i)(7)(C)
> "The term 'employment' shall not include service performed as an officer or member of the crew of a vessel on the navigable waters of the United States;"

As to the first point, it was admitted that these individuals perform services within the jurisdiction of the State of New Jersey. While performing such service, the service

was, in fact, *localized.* The loading and unloading of the grain is directed from the vessel by the superintendent who is in charge. This is the base of operations and the place from which the services are directed and controlled. During the time the vessel is located within the territorial limits of the State of New Jersey, services performed thereon are subject to the laws and authority of the State of New Jersey. It is found as a fact that the services performed by these individuals were localized in New Jersey, and the base of operations and the place from which the services were directed and controlled was in the State of New Jersey. Services performed within the territorial limits of the State of New Jersey on a vessel in navigable waters of the United States have been held to constitute employment. See *Shore Fishery, Inc.*, 127 N. J. L. 87, 21 A. (2d) 634.

As to the second point, the services performed by the captain, engineer, fireman and deckhand during the loading and unloading operations without a doubt, constitute employment. The time spent by these individuals in the navigation of the vessel was incidental to the shifting of the grain. Where services are merely incidental to navigation, such services are not excluded from the term "employment". See *Murphy* v. *Menke* (decided by the Supreme Court of Missouri on November 10, 1942). While performing such services, their duties are not those of a member of a crew and do not come within the exclusion of Section 19(i)(7)(C).

The superintendent, weigher and trimmer did not perform any services in connection with the navigation of the vessel. Their services were in the nature of stevedoring. See *In Re Casseratakis* (decided by the N. Y. Court of Appeals, 10-15-42). It is determined as a fact that the captain, engineer, fireman, deckhand, weigher, millwright, superintendent and trimmers were not officers or members of a crew, and their services constitute employment.

As to point three, the Unemployment Compensation Law of New Jersey includes services performed in maritime employment, excluding those of officers, and members of a crew performed on a vessel in navigable waters of the United States.

"The Unemployment Compensation Law does * * * not in any way * * * interfere with maritime and admiralty jurisdiction. The payment of an excise tax upon the privilege of employing others can no more be considered an unwarranted intrusion by the states into admiralty jurisdiction than can numerous other state taxes previously upheld; for instance, franchise taxes upon towing companies (*People ex rel. Cornell Steamboat Co.* v. *Sohmer,* 235 W. S. 549); taxation of insurance companies upon the writing of marine insurance policies (*Aetna Ins. Co.* v. *Houston Oil & Transport Co.,* 49 Fed. Rep. (2d) 121); taxes upon shipping (*Transportation Co.* v. *Wheeling,* 99 U. S. 273); and tolls levied upon interstate and foreign shipping using state-improved waterways. (*Sands* v. *Manistra River Improvement Co.,* 123 U. S. 288).

"A mere statement of this State law demonstrates that it does not modify or attempt to modify, alter or supplement the rights and liabilities of the parties to any maritime contract, nor does it touch remedies enforceable in admiralty. This tax exists independently of the employment out of which it arises. The measure of the tax by the amount of wages paid does not make the tax less independent of the occupation.

"The paramount power of Congress to legislate in the field of maritime law is implied from the grant to the Federal courts in section 2 of article III, of the Federal Constitution, of judicial power in all cases involving admiralty and maritime jurisdiction. It is, however, well settled that in the maritime field, just as in the field of interstate commerce generally, the state has power to act in matters of merely local concern, which do not require uniform national legislation. (*Cooley* v. *Board of Wardens,* 12 How. [U. S.] 299).

"It follows that there is no constitutional objection to coverage of maritime employments by the Unemployment Insurance Act of New York State."

This is quoted from the decision of the Court of Appeals of the State of New York in the matter of *In Re Casseratakis*. On the third point, see *Shore Fishery, Inc., supra.*

It is determined that the captain, engineer, fireman, deckhand, weigher, millwright, superintendent and trimmers performed services constituting employment. They were not performing services as members of a crew and their inclusion within the term "employment" is not in violation of the constitution of the United States.

It is determined that the International Elevating Co. did have eight or more individuals in employment for some portion of a day in twenty different weeks during the calendar year 1936.

DECISION:

The services performed by the captain, engineer, fireman, deckhand, weigher, millwright, superintendent and trimmers constitute employment.

The International Elevating Co. is an employer as defined by the New Jersey Unemployment Compensation Commission beginning January 1, 1936.

WILLIAM C. NOWELS,
William C. Nowels, Referee.

Dated:
December 22, 1942.

No. 231.

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IN THE

Supreme Court of the United States

October Term, 1942.

No. 723.

INTERNATIONAL ELEVATING COMPANY,
Appellant,

vs.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and JOSEPH BERGEN.

BRIEF FOR INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, APPELLEE.

NATHANIEL L. GOLDSTEIN,
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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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IN THE

Supreme Court of the United States

No. 723.

INTERNATIONAL ELEVATING COMPANY,
Appellant,
vs.
FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and JOSEPH BERGEN.

BRIEF FOR INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK, APPELLEE.

Scope of this Brief.

The questions presented by this case, concerning the constitutionality and applicability of the New York Unemployment Insurance Law in respect to maritime workers, are substantially similar to those raised in the three other cases in which the Industrial Commissioner is an appellee, namely:

Standard Dredging Corporation v. Frieda S. Miller as Industrial Commissioner, etc. and Mike Cassaretakis—October Term, 1942, No. 722.

Matton Steamboat Co., Inc. and Conners Marine Co., Inc. v. Frieda S. Miller as Industrial Commissioner, etc. and James R. Knowlson—October Term, 1942, No. 783.

Lake Tankers Corporation v. Frieda S. Miller as Industrial Commissioner, etc. and Jamel Sheredos—October Term, 1942, No. 813.

Our main brief in No. 783 not only sets forth our contentions in respect of the primary issues of constitutionality and interpretation in this case, but also deals with the counter-arguments advanced in all four of the cases. We submit a short separate brief in this case in order to deal with matters peculiar to the case at bar.

Opinions Below.

The opinion of the Court of Appeals of the State of New York (R. 60-69) is reported in 289 N. Y. 119, and reversed the decision of the Appellate Division of the Supreme Court of the State of New York, Third Department (R. 69-70), reported in 262 App. Div. 654, which rendered no opinion.

Jurisdiction.

The jurisdiction of this Court is invoked under § 237, as amended, of the Judicial Code (28 U. S. C. A. § 344).

Questions Presented.

The questions presented on the merits of this appeal are (1) whether the application of the New York Unemployment Insurance Law to one engaged in maritime employment within the State of New York contravenes Article III, § 2, of the United States Constitution and, (2) if not, whether Congress has affirmatively acted so as to deprive the State of jurisdiction to tax maritime employers.

Statement.

Appellant's brief, on pages 2 and 3, fails to state all the facts which have been found by the Unemployment Insurance Appeal Board (R. 3-5) and affirmed by the Court of Appeals (R. 61).

The additional facts which we consider important are as follows:

The grain elevators on which Appellee Bergen worked transferred grain in bulk between ocean going vessels and canal boats or other boats (R. 4). During 1938 and 1939 his work was the storing and trimming of grain in the holds of the ships (R. 4). Bergen was a member of a local union of the International Longshoremen's Association.

Appellant had a closed shop agreement with said union and only members of the union worked on the grain elevators. Compensation for the services of the union members was measured by a predetermined fixed scale of $5.00 for each thousand bushels handled. The trimmers usually met in a union meeting room on South Street in the City of New York, and if a job was available, all would proceed from the meeting room to the job (R. 4).

Bergen did not perform any work on the grain elevator until it had been tied up alongside the steamer and the harbor vessel between which the transfer of grain was to be effectuated. Occasionally, after one job was done there was another job to be done on a vessel tied up at a different pier. In that event, Bergen had his choice of proceeding by land to the other job or remaining on the grain elevator and being transported thereon, in which event

he did not participate in the navigation of the vessel (R. 4).

Bergen's work was all performed under the supervision of a superinendent in appellant's employ and not under the supervision of the captain of the grain elevator (R. 4).

While the boat was under way from one pier to another, it was then under the supervision of the captain of the vessel, who was a licensed individual (R. 4).

Bergen did not sign any ship's articles. He was not fed on the ship, and when he went to lunch he had to go to a restaurant situated on the shore. Bergen lived in the Borough of Brooklyn and went home to his residence every night. He worked eight hours a day and any work done thereafter was considered overtime. On a few rare occasions when Bergen was too tired to go home, he slept on the floor of the boat, as there were no sleeping accommodations on the boat (R. 4-5).

Appellant has conceded that the greater part of the work performed by Bergen in 1938 and 1939, prior to June 3, 1939, was in the State of New York, and that the base of operations after June 3, 1939, was in the State of New York (R. 5).

Unlike Knowlson, Appellee in No. 783, Appellee Bergen was not a member of the crew of the vessel. The Unemployment Insurance Appeal Board affirmed the decision of the Referee (R. 8), who had found that Bergen was not an officer nor a member of the crew of the vessel (R. 13). The Court of Appeals held Bergen was not a member of the crew (R. 62).

Statute Involved.

The statute involved is the New York Unemployment Insurance Law[1] (Labor Law §§500, *et seq.*). The pertinent sections of the statute in force during 1938 and 1939 are annexed as an appendix to our main brief, No. 783. No question concerning the construction of the statute, as distinguished from its constitutionality as construed, is present in this case, since the holding of the Court of Appeals that it applies to the particular maritime worker is binding as a decision of State law.

> "The construction given to a statute of a State by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text." (*Leffingwell v. Warren*, 2 Black 599, 603).

See, also:

Lloyd v. Matthews, 155 U. S. 222;
Brinkerhoff-Farris Trust & Savings Co. v. Hill, 281 U. S. 673.

The reference which appellant makes (Brief, pp. 5, 23-27) to an early opinion of the New York Attorney General (1936 Op. Atty. Gen. 268) which was based entirely upon the supposed compulsion of the *Knickerbocker*[2] and *Dawson*[3] cases, is therefore of no present significance.

No question of inequity exists by reason of the Court of Appeal's reversal of the Attorney General's 1936 opinion, because the legislature has provided that no taxes shall be collected with respect to wages paid prior to January 1,

[1] L. 1935 c. 468, and as amended, effective June 3, 1939, by L. 1939, c. 662.
[2] 253 U. S. 149.
[3] 264 U. S. 219.

1942 to officers or members of crews of vessels (N. Y. Laws 1943, c. 454). The claimant's right to unemployment benefits, which gave rise to this proceeding, has not been affected, however.

Summary of Argument.

The main points of law involved in this appeal are argued by us in companion case No. 783 (*Matton Steamboat Co., Inc. and Conners Marine Co., Inc. v. Frieda S. Miller, as Industrial Commissioner of the State of New York, and James R. Knowlson*). We respectfully refer to our brief in that case, of which copies are being furnished to counsel in this case.

POINT V.

Since Bergen was not a member of the crew, the Federal Unemployment Tax Act exempting from the Federal Tax Service performed as an officer or member of the crew of a vessel is not applicable, and appellant is left with the sole argument that the State law contravenes Article III, § 2, of the Federal Constitution.

Appellant has substantially withdrawn those parts of its Assignment of Errors (2-5) which relate to the Court of Appeals holding that claimant was not a member of the crew of a vessel (Brief, footnote, p. 8). Although part of the arguments based on the *Jensen*[1] case still apply, the concession which appellant has made removes one of the main arguments of appellants in the other cases.

The only Assignment of Error now relied upon by appellant and urged in its brief is that the application of the

[1] 244 U. S. 205.

New York State Unemployment Insurance Law to maritime employers and employees violates the provisions of Article III, §2 of the Constitution of the United States.

We have proved in our main brief No. 783 under Point II that the state law does not contravene Article III, §2 of the Federal Constitution. Since Bergen was not a member of the crew the provisions of the Federal Unemployment Tax Act advanced by appellants in No. 783 as barring the State from applying the Unemployment Insurance Law to a member of the crew, do not apply in this appeal.

We submit that if our legal arguments are sound, that the State Law does not contravene Article III, §2, of the Federal Constitution, then obviously the State has jurisdiction in the case at bar where Bergen was not a member of the crew.

CONCLUSION.

The Order Appealed From Should be Affirmed.

Albany, N. Y., April 28, 1943.

Respectfully submitted,

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